TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted] 360

SOUTHERN PACIFIC RAILROAD COMPANY, APPELLANT,

vs.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND CLAY TALLMAN, COMMISSIONER OF THE GENERAL LAND OFFICE.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED MAY 24, 1922.

(27,663)

(27,693)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 938.

SOUTHERN PACIFIC RAILROAD COMPANY, APPELLANT,

vs.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND CLAY TALLMAN, COMMISSIONER OF THE GENERAL LAND OFFICE.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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Court of Appeals of the District of Columbia.

No. 3300.

SOUTHERN PACIFIC RAILROAD, a Corporation, Appellant,

vs.

FRANKLIN K. LANE, Sec'y, &c., et al.

Supreme Court of the District of Columbia.

Equity. No. 36787.

SOUTHERN PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

FRANKLIN K. LANE, Secretary of the Interior, and CLAY TALLMAN, Commissioner of the General Land Office, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Bill of Complaint.*

Filed May 15, 1919.

In the Supreme Court of the District of Columbia.

Equity. No. 36787.

SOUTHERN PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

FRANKLIN K. LANE, Secretary of the Interior, and CLAY TALLMAN, Comimssioner of the General Land Office, Defendants.

To the Supreme Court of the District of Columbia, Holding an Equity Court:

The plaintiff, Southern Pacific Railroad Company, a corporation, respectfully represents:

I. It is a body corporate, duly created, organized and existing under and by virtue of the laws of the State of California; and brings this its bill of complaint against Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, in respect of the matters and things hereinafter set forth.

II. The defendant, Franklin K. Lane, is a citizen of the United States and a legal resident of the State of California, although temporarily residing in the District of Columbia; and the defendant, Clay Tallman, is a citizen of the United States and a legal resi-
2 dent of the State of Nevada, although temporarily residing in the District of Columbia.

III. At the several times hereinafter referred to, the defendant, Franklin K. Lane was, and he still is, Secretary of the Department of the Interior of the United States, and, as such, has charge of the administration of the laws of the United States relating to the public lands, and the administration of all land grants made by Congress including any portion of said public lands; and the defendant, Clay Tallman, was, and he still is, Commissioner of the General Land Office of the United States, the latter being one of the branches of said Department of the Interior, having immediate charge of the matter of the administration of the public lands of the United States, and of land grants made by Congress, said Commissioner acting therein under the direction, supervision and approval of the said Secretary of the Interior; and that each said defendant is sued in his official capacity as such Secretary of the Interior and Commissioner of the General Land Office, respectively, as hereinafter set forth.

IV. By an Act of the Congress of the United States, approved July 27, 1866, (14 Stat., 292), entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast," authority was given the Southern Pacific Railroad Company of California to construct a railroad and telegraph line, upon and under the certain conditions and stipulations expressed in said act, to connect with the Atlantic and Pacific Railroad Company at such point near the boundary line of the State of California as the companies named should deem most suitable for a railroad line to San Francisco; and said act contained a grant of lands to certain railroad corporations therein named, including specifically said Southern Pacific Railroad Company of California; said grant being thus:

"Sec. 3. And be it further enacted, That there be, and hereby is granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: * * * Provided further, That all mineral lands be, and the same hereby —, excluded from the operations of this act and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road and within twenty miles thereof, may be selected as above provided: And provided further, That the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: * * *"

By section four of said act, it was provided:

"And be it further enacted, That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for

4 the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workman-like manner, as in all other respects required by this act, the commissioners shall so report under oath, to the President of the United States, and patent of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and co-termin-us with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed, as aforesaid."

By section six of said act, it was thus provided:

"And be it further enacted, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September; eighteen hundred and forty-one granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby extended to all other lands on the line of said road when surveyed excepting those hereby granted to said company."

By section eleven of said act, it was thus provided:

"And be it further enacted, That said Atlantic and Pacific railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval and all other government service, and also subject to such regulations as Congress may impose restricting the charges for such government transportation."

5 By section twelve of said act, it was thus provided:

"And be it further enacted, That the acceptance of the terms, conditions and impositions of this act by the said Atlantic and Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction if its

board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall be deposited in the office of the Secretary of the Interior."

By section eighteen of said act, it was thus provided:

"And be it further enacted, That the Southern Pacific railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific railroad, formed under this act, at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco; and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific railroad herein provided for.

V. The Southern Pacific Railroad Company duly accepted the grant so made to it in said act, and duly filed in the Office of the Secretary of the Interior its written assent in that behalf; and, thereafter, there was duly passed by the Senate and House of Representatives of the United States in Congress assembled a certain joint resolution approved June 28, 1870, (16 Stat., 382), as follows:

"That the Southern Pacific Railroad Company of California may construct its roads and telegraph line, as near as may be on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each such section by commissioners to be appointed by the President, as provided in the act mak-
6 ing a grant of land to said company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions, provided for in the third section of said act."

VI. The said Southern Pacific Railroad Company duly constructed, completed and equipped a line of railroad, in the manner prescribed by the certain granting act and joint resolution of Con-

gress aforesaid, from San Jose to The Needles, on the Colorado River, except that portion thereof between Tres Pinos and Alcade, which latter was declared forfeited by the Act of Congress of September 29, 1890, (26 Stat., 496); and the same was duly accepted by the President of the United States, after the filing of sworn report by commissioners, as required by the certain granting act and joint resolution aforesaid.

VII. Plaintiff is the successor, (by consolidation), of said Southern Pacific Railroad Company of California, hereinabove named, and, by reason thereof, has become the legal successor in interest of all and singular the rights, titles, properties and franchises of the corporation last named, including the certain land-grant so made to the Southern Pacific Railroad Company of California, hereinabove mentioned.

7 VIII. By the provisions of a certain other act of Congress, approved March 3, 1887, (24 Stat., 556), the Secretary of the Interior was "authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted;" and although the fact is that the certain railroad hereinabove mentioned, provided for in said granting act and joint resolution aforesaid, has been constructed, equipped, and operated for a great many years, with all of the incidental benefits to the United States as fixed and provided by said granting act, the land grant itself remains unadjusted.

IX. And plaintiff states that the granting act of July 27, 1866, supra, and the said joint resolution of June 28, 1870, supra, constituted a contract between the United States and the said first-named Southern Pacific Railroad Company of California, (to the rights of which company this plaintiff has succeeded, as above,); that the indemnity grant therein contained was and is as much a part of said statutory contract as the grant of primary or place lands therein and thereby made; and that the said grant was intended to confer, and did confer, upon said railroad grantee the right to select indemnity land equal in area, acre for acre, for land lost within the primary or place limits of the grant; and, thereafter, to receive patent from the United States covering lands so selected in indemnity "confirming to said company the right and title to said lands."

8 X. And plaintiff states that, under and by virtue of the terms and provisions of the granting act aforesaid, it filed in the United States local land office, at Los Angeles, California, on April 23, 1903, its certain indemnity selection list No. 97, wherein selection was made by it of certain lands within the indemnity limits of its main line grant, the list embracing, inter alia, the fractional N½ NE¼, Section 1, Township 5 North, Range 7 West, San Bernardino Meridian, California, and designated certain base, (the description whereof is not here important,) in support of the selection. The selection was duly certified by the Register and Receiver of the United States local land office named, April 23, 1903.

Plaintiff attaches hereto true and correct copies of the several certificates and of the affidavits filed in support of the above indemnity selection list, and, also, of the two certificates of the local land officers attached hereto, certifying to the sufficiency and validity of the base lands designated for the indemnity selections, and to the legal availability of the indemnity lands so selected; the copies being marked, respectively Exhibits A, B, C, D, E, F, and G; and plaintiff asks that the same be taken and considered as a part hereof.

XI. And plaintiff further states that the above-described land, so sought in indemnity selection by it, is part of an odd-numbered section within the limits of the indemnity grant contained in said act of July 27, 1866, supra; and that, at the date of filing said list
9 of selections in the local land office, as aforesaid, the same was vacant, unoccupied, unappropriated land, non-mineral in character, and free and clear of and from the claim of any person whomsoever, and, therefore, under the terms and provisions of said granting act, was available for indemnity selection by plaintiff; and, furthermore, the tract aforesaid was and is needed by plaintiff in partial satisfaction of the land grant above mentioned.

XII. Plaintiff further states that, in accordance with the rules, regulations and practice of the Department of the Interior, the local land office named, thereafter, transmitted said certified selection list to the Commissioner of the General Land Office for appropriate consideration and the ultimate patenting to plaintiff of the lands embraced therein.

XIII. And plaintiff says that no action was taken by the Commissioner of the General Land Office in respect of the particular tract of indemnity land so selected as aforesaid and hereinabove described until, on March 20, 1918, the said List No. 97 was held for cancellation as to the above mentioned tract, namely, the frl. N½ NE¼ Section 1, Township 5 North, Range 7 West, S. B. M., for the reason that the base tracts designated therefor were not within the primary limits of the grant to the railroad company as shown by the (then) official diagram of said limits on file in said General Land Office, and so, as therein held, were not proper and valid base for the selection of indemnity. Said decision, however, gave to plaintiff
10 the right, within 30 days, to substitute good and valid base for the indemnity selection of the tract above described.

Plaintiff attaches hereto a true and correct copy of said decision, of March 20, 1918, as Exhibit H, and prays that the same be taken and considered as a part hereof.

XIV. And plaintiff says that, availing itself of the right to designate other base in substitution for that so held not to be proper base for the indemnity selection, as aforesaid, it requested, by communication dated April 18, 1918, the substitution, in lieu of the base originally designated and hereinabove described, of the following tracts, and which it designated for that purpose, the SE¼ SW¼ (40 acres), NE¼ SE¼ (40 acres), NE¼ NW¼ SE¼ (10 acres),

and E½ NW¼ NW¼ SE¼ (5 acres), of Section 15, Township 23 South, Range 22 East, Mt. Diablo Meridian, California, aggregating 95 acres.

Plaintiff attaches hereto a true and correct copy of said communication, of April 18, 1918, as Exhibit I, and prays that the same be taken and considered as a part hereof.

XV. Plaintiff further shows that, thereafter, on July 17, 1918, the defendant, Commissioner of the General Land Office, by Office letter "G," of that date, held that, although the entire said Section 15, Township 23 South, Range 22 East, M. D. M., was good base for the selection of indemnity; nevertheless, in view of the fact that the company, in its request for substitution of base, offered in addition to two legal subdivisions of the section named, parts only (aggregating 15 acres) of another legal subdivision of said section, he must decline to accept such tracts and parts of tracts as a proper base for the selection of the frl. N½ NE¼ of Section 1, Township 5 North, Range 7 West, S. B. M., California; citing in support of the ruling aforesaid, a certain decision of the Department of the Interior, dated January 19, 1918, (unpublished), in connection with a certain other indemnity selection list No. 130, filed by plaintiff and designated by the serial number Los Angeles 017622.

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Plaintiff attaches hereto a true and correct copy of said ruling of the Commissioner of the General Land Office, dated July 17, 1918, as Exhibit J; and, also, attaches, as Exhibit K, a true and correct copy of the decision of the Department of the Interior, dated January 19, 1918, hereinabove referred to; and prays that the same be taken and considered as a part hereof.

XVI. Plaintiff duly appealed to the defendant, Secretary of the Interior, from said decision of the defendant, Commissioner of the General Land Office, dated July 17, 1918, and hereinabove referred to, assigning as error the following:

"In holding that the base offered for said selection is not proper and valid.

"In holding that the entire acreage of any legal subdivision must be offered, if at all, as base in the same selection list; otherwise, that the base, (consisting of less than a legal subdivision), offered in one list, would be improper."

But plaintiff says that defendant, Secretary of the Interior, by decision of December 5, 1918, (promulgated December 9, 1918), affirmed the decision of the Commissioner of General Land Office, which latter decision, as hereinabove stated, held for rejection plaintiff's indemnity selection aforesaid.

12

Plaintiff attaches hereto a true and correct copy of the certain Departmental decision aforesaid, marked Exhibit L, and prays that the same be taken and considered as a part hereof.

XVII. And plaintiff says that, inasmuch as the defendant, Secretary of the Interior, has affirmed the decision of the defendant, Commissioner of the General Land Office, its only remaining remedy is by appropriate appeal to the courts for relief from the rulings aforesaid; which rulings, as plaintiff is advised by counsel and accordingly so avers, are erroneous in matter of law.

XVIII. And plaintiff says that, as hereinabove set forth, it is entitled to indemnity, acre for acre, for all sections or parts of sections lost to the primary grant; and that all that can properly be exacted or required of plaintiff in support of such indemnity selection is that it shall designate an equal area of land lost from its primary grant, and this irrespective of whether the base so designated embraces all or only part of a legal subdivision. And, in this connection, plaintiff further says that, inasmuch as no title passed to it for lands lost to the primary grant, and in respect of which it is entitled to receive indemnity, under the grant act aforesaid, the only interest
13 and concern of the United States in the premises is that the tract designated as base for the indemnity selection (*a*) shall have been lost to the primary grant; (*b*) is susceptible to identification upon the land records of the Department of the Interior; and (*c*) has not theretofore been used by the selecting company in support of some other indemnity selection; all of which several conditions of fact, however, are present in the instant case.

XIX. Plaintiff further says that while each and every part of the subdivision known as the SE¼ of Section 15, Township 23 North, Range 22 East, M. D. M., so designated by it, (along with another tract), in support of its indemnity selection aforesaid, (*a*) is susceptible of exact identification upon the land records of the Department of the Interior; (*b*) that all thereof has been lost to the primary grant of plaintiff company; and (*c*) that no part thereof has been heretofore designated or used by it as base for an indemnity selection; nevertheless, the rulings and decisions made by defendants, and of which complaint is made herein, undertake to deprive plaintiff of the benefit of its right of indemnity selection unless the entire said SE¼ of Section 15 be designated as base in one and same indemnity selection list; a requirement which plaintiff avers is purely arbitrary and without warrant or support in the granting act aforesaid.

XX. Plaintiff states that, by full construction of the railroad provided for by the certain granting act hereinabove mentioned,
14 and otherwise by complying with the terms, conditions, and exactions thereof, the right and title to the tract of land embraced in this suit has been fully earned, and that the same is needed in partial satisfaction of said grant; but that, nevertheless, the right of plaintiff in the premises is sought to be defeated by the unauthorized and arbitrary action of the defendants, as hereinaforesaid.

XXI. And plaintiff further states that if the certain rulings hereinabove set forth be permitted to stand, it will result in depriving the

plaintiff from utilizing various and sundry tracts of lands included within the primary limits of its aforesaid grant, but lost to it by reason of the terms and conditions thereof, and which, but for the rulings herein complained of, could and would otherwise be used by plaintiff as base for the selection of indemnity; that the action herein complained of is in violation of the statutory contract accomplished and effected by said granting act of July 27, 1866, supra, and will result in irreparable loss, damage and injury to this plaintiff, for which it has no adequate remedy at law, and is otherwise remediless except in equity.

Wherefore, the premises considered, the plaintiff prays:

1. That the process of this court may issue, directed to the defendants, Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, requiring them, and each of them, to appear and make answer unto the foregoing bill of complaint, but not under oath, answer under oath being hereby expressly waived.

2. That, upon the filing of this bill, or at such short day thereafter as shall be fixed by the court, a preliminary order may issue herein restraining and enjoining, pendente lite, the defendants, and each of them, their and each of their successors in office, and each, every and all persons claiming to act under their, or either of their, authority or control, from enforcing any or either of the certain rulings, holdings and decisions mentioned and complained of in the foregoing bill of complaint, or from cancelling or rejecting the certain indemnity selection so heretofore made by plaintiff of the frl. N½ NE¼, Section 1, Township 5 North, Range 7 West, S. B. M., insofar as the same may be based upon the reasons so assigned by the defendants in the certain rulings and decisions herein aforesaid.

3. That, upon final hearing, said restraining order and injunction may be made perpetual, and that mandatory injunction may issue against said defendants, commanding and requiring that each of the certain rulings, holdings and decisions aforesaid be vacated and set aside, and that the right granted and secured to plaintiff under the certain granting act herein aforesaid be recognized, respected and given its full legal force and effect, excluding from any and all consideration in connection with plaintiff's indemnity selection of the tract aforesaid the certain rulings and decisions herein complained of.

4. And that plaintiff may have all such other and further relief as the nature of its case may demand and require, and as may be agreeable to equity.

SOUTHERN PACIFIC RAILROAD COMPANY,
By PAUL SHOUP,
President.

[SEAL.]

Attest:
G. L. KING,
Secretary.

16 A. A. HOEHLING. JR.,
C. F. R. OGILBY,
Attorneys for Plaintiff.

The defendants to this bill of complaint are—

1. Franklin K. Lane, Secretary of the Interior.
2. Clay Tallman, Commissioner of the General Land Office.

COUNTY OF SAN FRANCISCO,
State of California, ss:

Before me, the undersigned, a Notary Public in and for the County and State aforesaid, personally appeared Paul Shoup, who, being by me first duly sworn, on oath, says: That he is the President of the Southern Pacific Railroad Company, a corporation, duly created, organized, and existing under the laws of the State of California, said corporation being the plaintiff named in the foregoing and annexed bill of complaint; and that G. L. King is the Secretary of said corporation; that he has read the foregoing bill of complaint, by him subscribed for and in the name of said corporation, and is acquainted with the contents thereof, and that the several matters and things therein set forth and contained are true, as he verily believes; and he further states that the seal attached to said bill of complaint is the seal of said corporation, and was thereto affixed by authority of said corporation, and that he subscribed his name thereto as President by like authority.

PAUL SHOUP.

17 Subscribed and sworn to before me, this 2nd day of May, A. D. 1919.

E. B. RYAN,
Notary Public.

[SEAL.]

EXHIBIT A.

Office of the Southern Pacific Railroad Company.

San Francisco, California.

I, Joseph L. Willcutt, Secretary of the Southern Pacific Railroad Company, do hereby certify that Jerome Madden was appointed Land Agent of the said Southern Pacific Railroad Company, successor by consolidation to the Southern Pacific Railroad Company (of California), by the Board of Directors of said Company, at a meeting held on the fourteenth (14th) day of March, 1902, and that since that time he has been continuously, and is now, the Land Agent

of the said Southern Pacific Railroad Company, successor as aforesaid.

In testimony whereof, I have hereunto set my hand and affixed the Corporate Seal of the said Southern Pacific Railroad Company, the 23d day of January A. D. 1903.

[CORPORATE SEAL.]

JOSEPH L. WILLCUTT,
Secretary of the Southern Pacific Railroad Company.

18 EXHIBIT B.

List of Lands in the Los Angeles Land District, California, Selected by the Southern Pacific Railroad Company, Successor by Consolidation to the Southern Pacific Railroad Company (of California).

The Undersigned, the duly authorized Land Agent of the Southern Pacific Railroad Company, successor by consolidation to the Southern Pacific Railroad Company (of California), under and by virtue of the Act of Congress, approved July 27, 1866, entitled, "An Act granting lands to aid in the construction of a Railroad and Telegraph line from the States of Missouri and Arkansas to the Pacific Coast," and the further Act, approved July 25, 1868, entitled, "An Act to extend the time for the construction of the Southern Pacific Railroad in the State of California," and the Joint Resolution of Congress, approved June 28, 1870, "concerning the Southern Pacific Railroad of California," and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office, hereby makes and files the following list of selections of public lands claimed by the said Company as inuring to it as such successor and to which it is entitled under and by virtue of the grants and provisions of the said Acts of Congress, and the location of the line of route of the Railroad and Telegraph of said Company, being in part for the
19 Eleventh (11th) section (Forty (40) miles) of the same, commencing at Mojave and ending at Kramer which said section of road and telegraph has been duly accepted by the President of the United States, as provided in the aforesaid Acts and Joint Resolution of Congress; the selection being particularly described as follows:

JEROME MADDEN,
Land Agent of the Southern Pacific Railroad Company.

EXHIBIT C.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, Jerome Madden, being duly sworn, depose and say: that I am the Land Agent of the Southern Pacific Railroad Company, successor by consolidation to the Southern Pacific Railroad Company (of California); that the foregoing list of lands which I hereby select is

a correct list of a portion of the public lands claimed by the said Southern Pacific Railroad Company, successor as aforesaid, as inuring to it to aid in the construction of the railroad of said Company from Mojave to Kramer, for which a grant of lands was made by the Acts of Congress approved July 27, 1866, July 25, 1868, and June 28, 1870, as aforesaid; that the said lands are vacant, unappropriated, and are not interdicted mineral or reserved lands, and are of the character contemplated by the grant, being within the limits of the exterior ten (10) miles, Indemnity Belt, on each side of the line of route for a continuous distance of Forty (40) miles, being
20 for the Eleventh (11th) section of said road, starting from a point in N. E. ¼ Sec. 17, T. 11 N., R. 12 W., S. B. B. & M., and ending at a point in N. E. ¼ Sec. 6, T. 10 N., R. 6 W., S. B. B. & M., and that the specific losses for which indemnity is claimed are truly set forth and described in said list, and that said losses have not heretofore been indemnified in any manner.

JEROME MADDEN. [SEAL.]

Sworn to and subscribed before me, this 24th day of January, 1903. Witness my hand and Notarial Seal.

[NOTARIAL SEAL.]

E. B. RYAN,
Notary Public in and for the City and County of San Francisco, in the State of California.

EXHIBIT D.

UNITED STATES LAND OFFICE,
LOS ANGELES, CAL., April 23rd, 1903.

We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Southern Pacific Railroad Company, successor by consolidation to the Southern Pacific Railroad Company (of California), under the grant to the said Southern Pacific Railroad Company (of California), by Acts of Congress, approved July 27, 1866, July 25, 1868, and June 28, 1870, above mentioned, and selected by Jerome Madden, the duly authorized agent; and that we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct;
21 and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and within the limit of the exterior ten (10) miles, Indemnity Belt, on each side; and that the same are not, nor is any part thereof, returned and denominated as mineral land or lands, or claimed as swamp lands; nor is there any homestead, pre-emption, State, or other valid claim to any portion of said lands on file or record in this office.

We further certify that the foregoing list shows an assessment of the fees payable to us allowed by the Acts of Congress, approved July 1, 1864, and July 31, 1876, and contemplated by the circular of in-

structions dated November 7, 1879, addressed by the Commissioner of the General Land Office to Registers and Receivers of the United States Land Offices; and that the said Company has paid to the undersigned, the Receiver, the full sum of Two hundred and eighteen ($218.00) dollars in full payment and discharge of said fees.

A. J. CROOKSHANK,
Register,
ARTHUR W. KINNEY,
Receiver.

EXHIBIT E.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Jerome Madden being duly sworn deposes and says that he is the Land Agent of the Southern Pacific Railroad Company, that he has caused the lands selected in said Company's List No. 97 to be
22 carefully examined by the agents and employees of said Company as to their mineral or agricultural character, and that to the best of his knowledge and belief, none of the lands returned in said list are mineral lands.

JEROME MADDEN.

Subscribed and sworn to before me this 24th day of January, 1903.
[NOTARIAL SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

EXHIBIT F.

SAN FRANCISCO, CAL., January 23d, 1903.

The Southern Pacific Railroad Company offers to pay under protest the expense of surveying the lands selected in the within list, because it claims to be exempt from such payment by provision of the grant of lands to it by Congress.

JEROME MADDEN,
Land Agent, Southern Pacific R. R. Co.

23 EXHIBIT G.

UNITED STATES LAND OFFICE,
VISALIA, CAL., April 2, 1903.

I hereby certify that I have carefully examined List No. 97 of lands selected by the Southern Pacific Railroad Company in the Los Angeles District, Indemnity Limits, Main Line, and I find that the lands therein described, for which said Company seeks to take indemnity, are within the 20-mile limits of the reservation for said

Company in the Visalia Land District, that said lands have been lost to said Company, and that it is entitled to indemnity therefor.

GEO. W. STEWART,
Register.

EXHIBIT H.

S. P. R. R. List 97, Los Angeles. "G." V. D.

Department of the Interior,

General Land Office,

Washington.

March 20, 1918.

List Held for Cancellation in Part Because of Invalid Base

Register and Receiver, Los Angeles, California.

SIRS:

April 23, 1903, the Southern Pacific Railroad Company filed its M. L. Indemnity List No. 97, selecting among other tracts, the frl. N½ NE¼ Sec. 1, T. 5 N., R. 7 W., S. B. M., offering as a 24 base therefor, lots 7 and 8, Sec. 7, T. 32 S., R. 26 E., M. D. M.

The above-mentioned lots 7 and 8 being within the indemnity limits of the grant, as shown by the official diagram of said limits on file in this office, do not constitute a proper base for said selection.

The Company's selection of the N½ NE¼ Sec 1, T. 5 N., R. 7 W., S. B. M., in its List No. 97, being therefore, unsupported by a good and valid base, is hereby held for cancellation subject to the right of the company to substitute within 30 days a good and valid base.

In the event of the failure of the company to offer a proper base in support of its selection or to appeal herefrom within 30 days from the date of receipt of notice hereof, its selection of the N½ NE¼ Sec. 1, T. 5 N., R. 7 W., S. B. M., in said List No. 97, hereby held for cancellation, will be finally canceled and the case closed.

The resident attorney for the company will be notified hereof direct by this office.

Very respectfully,

CLAY TALLMAN,
Commissioner.

BOARD OF LAW REVIEW,
By W. B. PUGH.

EXHIBIT I.

Division "G."
Los Angeles Main Line.
Indemnity List 97.
Southern Pacific R. R. Co.
Substitution of base.

April 18, 1918.

The Honorable the Commissioner of the General Land Office.

SIR:

By your Office letter "G," dated March 20, 1918, you held for cancellation the selection by the Southern Pacific Railroad Company of the Frl. N½ NE¼ of Section 1, T. 5 N., R. 7 W., S. B. M., embraced in its certain list No. 97, supra, for the reason that the selection of said tract was not supported by good and valid base.

On behalf of said company, and at the request of Mr. B. A. McAllaster, its Land Commissioner, I now have the honor to request that, as base for the above selected tract, you substitute the SE¼ SW¼, NE¼ SE¼, NE¼ NW¼ SE¼, and E½ NW¼ NW¼ SE¼ of Section 15, T. 23 S., R. 23 E., M. D. M., 95 acres.

In connection with this request, I have the further honor to call attention to my letter to you, of even date herewith, asking your approval of withdrawal of said company's selection of all of Section 15, T. 12 N., R. 6 E., S. B. M., embraced in its indemnity selection list No. 20, Independence 01371; this in order that the base offered and surrendered therefor, (and of which the certain base hereinbefore mentioned is a part), may be used in substitution for base offered in certain other of its selection lists, recently held by your Office to be insufficient and invalid, and including your certain Office letter "G," dated March 14, 1918, supra.

I have the further honor to request that I be advised of the action taken by you hereon.

Respectfully,

A. A. HOEHLING, JR.,
Attorney for Above Company.

26 EXHIBIT J.

S. P. R. R. Indemnity List 97, Los Angeles. "G." V. D.

Department of the Interior,

General Land Office,

Washington.

July 17, 1918.

Allowing 30 Days Additional for Substitution of Base.

Register and Receiver, Los Angeles, California.

SIRS:

April 23, 1903, the Southern Pacific Railroad Company filed its main line Indemnity List 97, selecting among other tracts the fractional N½ NE¼ Sec. 1, T. 5 N., R. 7 W., S. B. M., containing 99.46 acres; offering as base thereof Lots 7 and 8, Sec. 7, T. 32 S., R. 26 E., M. D. M.

By letter dated March 20, 1918, this office held said list for cancellation as to the above mentioned selection, for the reason, that the base tracts offered were not within the primary iimits of the grant to the Company.

This office is in receipt of a letter from the resident attorney for the Company dated April 18, 1918, wherein he states

"On behalf of said Company, and at the request of Mr. B. A. McAllaster, its Land Commissioner, I now have the honor to request that as base for the above selected tract, you substitute the SE¼ SW¼, NE¼ SE¼, NE¼ NW¼ SE¼, and E½ NW¼ NW¼ SE¼ of Section 15, T. 23 S., R. 22 E., M. D. M., 95 acres."

The records of this office show that Sec. 15, T. 23 S., R. 22 E., M. D. M., is within the primary limits of the grant, said section was approved to the State of California February 16, 1900 list 94 as Swamp Land under the Act of September 28, 1850, is there-
27 fore lost to the Company under its grant and any legal subdivision of said section is good basis for Indemnity selection.

In view of the fact however that the Company in its request for substitution of base, offers in addition to two legal subdivisions parts (15 acres) of another legal subdivision, I must decline to accept such tracts and parts *or* tracts as a proper base for the selection of the fractional N½ NE¼, Sec. 1, T. 5 N., R. 7 W., S. B. M.

The question as to whether a part of a legal subdivision is a proper basis for the purpose of making indemnity selections was passed upon by the Department in its decision of January 19, 1918, (unpublished) in Docket 32180, being the appeal of the Southern Pacific

R. R. Co., from office decision of January 24, 1916, wherein certain selections made by the Company in its indemnity list 130 (serial Los Angeles 017622) were held for cancellation because part of a legal subdivision was offered as base in support of said selection.

The Department in its decision referred to, reversed this office, not however because the decision of this office was based upon a wrong conclusion, but because of the fact that the entire legal subdivision was offered as base in the same list, although for separate and distinct items in said list. The Department in its decision states in part as follows:

"While it is an established rule that parts of minor legal subdivisions of surveyed public lands cannot be entered, selected, relinquished, or surrendered, under the public land laws, except in entries of particular kinds, that rule should not be invoked to defeat a selection, like the one under consideration, in which the base lands are all surrendered in the same selection list, notwithstanding
28 the fact that they may be embraced in separate and distinct items in that list."

The Company in the present case has not offered in any part of its indemnity list 97 the remaining 25 acres of the NW¼ SE¼ of Sec. 15, T. 23 S., R. 22 E., M. D. M., as a base.

The Company is hereby allowed an additional 30 days from the receipt of notice hereof within which to offer a good and valid base in support of its selection of the fractional N½ NE¼ Sec. 1, T. 5 N., R. 7 W., S. B. M., in said list 97. If the Company fails to comply herewith or to appeal herefrom within the time allowed said list which was held for cancellation by letter of March 20, 1918, will be canceled and the base closed as to said tract.

The resident attorney for the Company will be notified hereof by this office.

Very respectfully,

CLAY TALLMAN,
Commissioner.

EXHIBIT K.

Department of the Interior,

Washington.

D—32180. January 19, 1918.

"F."

Southern Pacific Railway Company.
Main Line Indemnity List No. 130.
Los Angeles 017622.
Independence 01371.
Selection list rejected in part.
Reversed.

Appeal from the General Land Office.

On February 1, 1913, the Southern Pacific Railway Company filed its main line indemnity selection list No. 130 (Los Angeles 017622), which embraced the selected tracts in separate and distinct items numbered 1 to 12, respectively, of which items 5, 7 and 10, here involved, embraced the W½ SE¼ SE¼, Sec. 13, T. 5 N., R. 11 W., S. B. M., 20 acres, the E½ SE¼, Sec. 1, T. 5 N., R. 12 W., S. B. M., 80 acres, and the W½ NE¼ SW¼ SW¼ Sec. 29, T. 7 N., R. 13 W., S. B. M., containing 5 acres.

On January 16, 1915, the General Land Office held the bases assigned in items 5 and 7 to be invalid and that the base assigned in item 10, which contained only 2 acres, was not sufficient to bring it within the rule of approximation, the selected tract embracing 5 acres.

In some of the items in the list the area of the base lands exceeded that of the selected tracts, as, for instance, in item 6, 80 acres was selected, while the base assigned contained 83.09 acres. These excesses were far more than sufficient to cover the deficit in item 10. In view of this fact the company assigned new bases in items 5 and 7, and then asked that the excess mentioned above be added to the base already assigned in item 10.

On January 24, 1916, the General Land Office declined to accept the new bases assigned in items 5 and 7, for reasons to be hereafter mentioned, and further held that the excess of the base lands over the selected lands mentioned above could not be credited to item 10 under the rule followed by this Department in its unreported decision rendered March 10, 1913, in the case of the Northern Pacific Railway Company's Washington clear list No. 206, and Northern Pacific Railway Company (43 L. D. 534), where it was held, in effect, that each item in a selected list, such as the one now under consideration, should be treated as a separate and distinct selection within and of itself, and must stand or fall, accordingly, as its own sufficiency or insufficiency appeared at the time of its consideration, and could not be strengthened and sustained by facts shown in other items in the same list.

In item 5, the E½ SE¼ NW¼ Sec. 5, T. 21 S., R. 22 E., was assigned as a base and in item 7 the other half of that forty-acre tract subdivision, the W½ SE¼ NW¼, of said section, was, with other lands, named as the base.

The General Land Office based its rejection of items 5 and 7 on the ground that the base lands embrace less than and only a part of a technical legal subdivision, and the rejection of item 7 was based on the further ground that one of the other tracts offered as base lands, the Swamp Lot, in the NE¼ NE¼, Sec. 31, T. 61 S., R. 23 E., 8.75 acres, could not form the base of a selection, because it was a part of the bed of a meandered stream. The selector, in its appeal from that decision, contends that it was erroneous in holding that parts of the same legal subdivision could not be assigned as bases in different

items in the same list, and also in refusing to consider the excess mentioned in connection with the base assigned in item 10, but it conceded the correctness of the holding as to the "swamp lot," and later, as is now shown by the records of the General Land Office, substituted therefor another tract, lot 10, Sec. 29, T. 23 S., R. 19 E., containing 9.07 acres, or .32 acres more than was contained in the swamp lot.

While it is an established rule that parts of minor legal
31 subdivisions of surveyed public lands cannot be entered, selected, relinquished, or surrendered, under the public land laws, except in entries of particular kinds, that rule should not be invoked to defeat a selection, like the one under consideration, in which the base lands are all surrendered in the same selection list, notwithstanding the fact that they may be embraced in separate and distinct items in that list. That rule could not be applied in this case on any other theory than that each item in the selection list must, for all purposes, be considered, treated and disposed of as an individual selection standing alone. While this rule was adopted in aid of the convenient and expeditious consideration of such lists and for the further purpose of avoiding loss to the Government through the possibility of the assignment of the same lands as the base for more than one selection, it is not believed that it should be invariably invoked, or be applied at all in cases where its requirement would work an unnecessary hardship, or impose an unreasonable burden, and much less so in cases where its application would result in substantial loss to the selector. Where, as in this case, there are a limited number of items in a selection list, and the lands assigned as bases in different items could be made to form a sufficient base if assigned as such in a single item embracing all the selected tracts, there is no good reason why such items should not be considered together and treated collectively when necessary, instead of individually. In William Hickey's case (26 L. D., 621), it was said (syllabus):

Indemnity selections are made under the direction of the Secretary of the Interior, and the enforcement of any requirement in the
32 matter of a specification of a loss is only for his information, and as a bar to the enlargement of the grant, and may be waived whenever he deems such a course advisable.

It is believed that the facts now before this Department amply justify the approval of this selection, in so far as items 5, 7 and 10 are concerned. The decision appealed from is therefore reversed and the case is remanded with directions that it receive further consideration and adjudication, in accordance with the views herein expressed.

(Signed) ALEXANDER T. VOGELSANG,
First Assistant Secretary.

EXHIBIT L.

Department of the Interior,

Washington.

D—36577. December 5, 1918.

Southern Pacific R. R. Co.

"G."

Indemnity List 97, Los Angeles.
Cancellation, in part.
Affirmed.

Appeal from the General Land Office.

April 23, 1903, the Southern Pacific Railroad Company filed its main line indemnity list 97 selecting, with other tracts, the fractional N½ NE¼, Sec. 1, T. 5 N., R. 7 W., S. B. M., 99.46 acres, Los Angeles, California. As base for such selection lots 7 and 8, Sec. 7, T. 32 S., R. 26 E., M. D. M., were offered.

33 March 20, 1918, the Commissioner of the General Land Office held said list for cancellation as to the land above described, for the reason that the base tracts offered were not within the primary limits of the grant to the company.

Of date of April 18, 1918, there was filed by the representative of the company the following offer of substitute base:

On behalf of said Company, and at the request of Mr. B. A. McAllaster, its Land Commissioner, I now have the honor to request that as base for the above selected tract, you substitute the SE¼ SW¼, NE¼ SE¼, NE¼ SW¼, SE¼, and E½ NW¼ NW¼ SE¼, of Section 15, T. 23 S., R. 22 E., M. D. M., 95 acres.

July 7, 1918, the Commissioner rejected the above proposition as follows:

The records of this office show that Sec. 15, T. 23 S., R. 22 E., M. D. M., is within the primary limits of the grant, said section was approved to the State of California February 16, 1900 list 94 as Swamp Land under the Act of September 28, 1850, is therefore lost to the Company under its grant and any legal subdivision of said section is good basis for Indemnity selection.

In view of the fact however that the Company, in its request for substitution of base, offers in addition to two legal subdivisions parts (15 acres) of another legal subdivision. I must decline to accept such tracts and parts of tracts as a proper base for the selection of the fractional N½ NE¼ Sec. 1, T. 5 N., 7 W., S. B. M.

From this decision appeal has been taken to the Department contending that a portion of a legal subdivision may be offered as base for indemnity selection, even though the balance of such legal subdivision is not offered as base in the same indemnity list.

The Department has considered this proposition in connection with all statutes and regulations applicable thereto and is convinced that good administration will not permit the acceptance of a portion of a legal subdivision, as offered in this case. If the balance
34 of such legal subdivision were offered as base in the same list, the case would come within departmental decision in the case of the Southern Pacific Railway Company (46 L. D., 279).

The decision appealed from is affirmed.

(Signed) ALEXANDER T. VOGELSANG,
First Assistant Secretary.

Rule to Show Cause.

Filed May 15, 1919.

* * * * * * *

Upon consideration of the bill of complaint herein, and upon application in that behalf made, it is by the Court, this 15th day of May, A. D. 1919, ordered:

That Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, defendants herein, show cause to this Court, if any they have, on Friday, the 6th day of June, A. D. 1919, at 10 o'clock A. M., why preliminary injunction and restraining order should not issue as prayed in said bill of complaint; provided a copy of this rule be served upon said defendants not less than five days prior to the date above named.

WILLIAM HITZ,
Justice.

Marshal's Return.

Served a copy of the within rule on Franklin K. Lane and
35 Clay Tallman, personally: May 15, 1919.

MAURICE SPLAIN,
U. S. Marshal.

Return to Rule to Show Cause.

Filed June 4, 1919.

* * * * * * *

Come now the defendants, by their attorneys, and represent that they have filed a motion to dismiss the bill af complaint in the above-entitled suit; and by way of return to the rule to show cause herein

issued, they further say that they elect to stand upon those matters of law set forth in said motion to dismiss.

Wherefore they pray that the said rule may be discharged.

FRANKLIN K. LANE,
Secretary of the Interior,
CLAY TALLMAN,
Commissioner of the General Land Office.

By Their Attorneys: CHARLES D. MAHAFFIE,
Solicitor.
C. EDWARD WRIGHT,
Assistant Attorney.

36 *Motion to Dismiss.*

Filed June 4, 1919.

* * * * * * *

Come now the defendants, by their attorneys, and move to dismiss the bill of complaint herein filed; and for cause show:

1. That the plaintiff has not in or by its bill exhibited a cause for the relief prayed or for any relief in equity.

2. That the bill fails to show any facts that would support a finding that the plaintiff, by reason of anything done or threatened to be done by the defendants in the premises, will be deprived of any substantial right accruing to it under any existing law.

3. That the bill shows that the matters complained of are matters of mere administration of Federal law, the details and conduct of which are within the exclusive jurisdiction of the defendants.

4. That the relief sought involves judicial interference with, and control of, a matter within the exclusive jurisdiction of the defendants, involving the exercise of their judgment and discretion.

Wherefore they pray that the bill may be dismissed, with their reasonable costs, and that they may be permitted to go hence without day.

FRANKLIN K. LANE,
Secretary of the Interior,
CLAY TALLMAN,
Commissioner of the General Land Office,

By Their Attorneys: CHARLES D. MAHAFFIE,
Solicitor.
C. EDWARD WRIGHT,
Assistant Attorney.

37 *Decree Dismissing Bill.*

Filed June 11, 1919.

* * * * * * *

This cause came on to be heard on the return to the rule to show cause and upon the motion of the defendants to dismiss the bill of complaint, and was argued by counsel; whereupon, the court having been fully advised in the premises, it is, this 11th day of June, 1919.

Ordered, adjudged, and decreed that the rule to show cause be and the same is hereby discharged, that the bill be and the same is hereby dismissed, and that defendants recover their reasonable costs, to be taxed by the clerk.

By the court: JENNINGS BAILEY,
Justice.

And from the foregoing decree, on the day above written, the plaintiff in open court notes an appeal to the Court of Appeals of the District of Columbia, and the same is hereby allowed; the penalty of a bond for costs being fixed in the sum of One Hundred Dollars, with leave to deposit with the clerk, in lieu thereof, the sum of Fifty Dollars.

By the court:
JENNINGS BAILEY,
Justice.

No objection as to form
A. A. HOEHLING, JR.,
Att'y for Pl't'ff.
6/6/19.

38 *Assignments of Error.*

Filed June 25, 1919.

* * * * * * *

The appellant, Southern Pacific Railroad Company, a corporation, hereby designates the following assignments of error in the certain final decree of the court, entered in the above-entitled cause, June 11, 1919, dismissing the bill of complaint filed therein by plaintiff:

1. In holding that the selection made by appellant of the lands involved in this suit, the same being non-mineral in character, designated by odd-number, within the indemnity limits of the railroad grant, of the character subject to such selection, and needed in partial satisfaction of the grant, and in support of which selection appellant has designated valid base; nevertheless, is to be defeated and rejected because the base so designated, while susceptible of precise and exact identification upon the land records of the Department of

he Interior, is less, in the aggregate, than an entire forty (40) acre egal subdivision.

2. In upholding the right claimed and exercised by defendants to eject arbitrarily a selection of indemnity lands to which appellant s lawfully entitled, the selection being supported by the designation f valid and legal base, merely because of the fact that the base so lesignated is less, in the aggregate, than an entire forty (40) acre egal subdivision.

3. In upholding the right claimed and exercised by defendants to mpair and lessen the indemnity grant of appellant by arbitrarily insisting that base designated in support of an indemnity selection shall not be less, in the aggregate, than an entire forty (40) acre legal subdivision; thereby placing a limitation upon the right of indemnity selection not warranted by the granting act.

4. In discharging the rule to show cause, and in granting defendants' motion to dismiss the bill of complaint.

5. In failing to grant to plaintiff the relief prayed against the defendants.

6. Other errors appearing on the face of the record herein.

A. A. HOEHLING, JR.,
Attorney for Appellant.

Service of copy of the above Assignments of Error acknowledged, this 20th day of June, A. D. 1919.

C. EDWARD WRIGHT,
Attorney for Defendants.

Designation of Record on Appeal.

Filed June 25, 1919.

* * * * * * *

To John R. Young, Esq., Clerk Supreme Court of the District of Columbia.

DEAR SIR:

On behalf of the above-named Southern Pacific Railroad Company, a corporation, plaintiff and appellant, I request that you will cause to be prepared the transcript of record on appeal in the above-entitled cause; and I hereby designate the following to be included in said transcript:

1. Bill of complaint, and all exhibits attached thereto, being marked Exhibits "A" to "L," both inclusive.

2. Rule to show cause.

3. Return of defendants to rule to show cause.

4. Motion of defendants to dismiss the bill of complaint.

5. Decree discharging rule to show cause, and dismissing the bill of complaint, including indorsement thereon of appeal in open court and order fixing amount of appeal bond for costs.

6. Assignments of error.

7. Memorandum of approval and filing of bond for cost on appeal.

8. This designation.

A. A. HOEHLING, JR.,
Attorney for Said Appellant.

Service of copy of above Designation acknowledged, this 20th day of June, A. D. 1919.

C. EDWARD WRIGHT,
Attorney for Defendants.

Memorandum

June 27, 1919.—Appeal bond approvad and filed.

41 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 40, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 36787 in Equity, wherein Southern Pacific Railroad Company, a corporation, is Plaintiff and Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 3rd day of July, 1919.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG,
Clerk,
By W. E. WILLIAMS,
Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 3300. Southern Pacific Railroad, a corporation, appellant, vs. Franklin K. Lane, Sec'y, &c., et al. Court of Appeals, District of Columbia. Filed Aug. 4, 1919. Henry W. Hodges, clerk.

Friday, February 6th, A. D. 1920.

No. 3300.

SOUTHERN PACIFIC RAILROAD COMPANY, a Corporation, Appellant,

vs.

FRANKLIN K. LANE, Secretary of the Interior, and CLAY TALLMAN, Commissioner of the General Land Office.

The argument in the above entitled cause was commenced by Mr. A. A. Hoehling, attorney for the appellant, and was continued by Mr. C. E. Wright, attorney for the appellees, and was concluded by Mr. A. A. Hoehling, attorney for the appellant.

In the Court of Appeals of the District of Columbia.

No. 3300.

SOUTHERN PACIFIC RAILROAD COMPANY, a Corporation, Appellant,

vs.

FRANKLIN K. LANE, Secretary of the Interior, and CLAY TALLMAN, Commissioner of the General Land Office.

Opinion.

Opinion of the Court per Mr. Chief Justice SMYTH:

The railroad company filed its bill against the Secretary of the Interior and the Commissioner of the General Land Office in which it prayed that they might be restrained from enforcing certain rulings passed by the Secretary, and from rejecting certain land selections made by the railroad company. The defendants moved to dismiss the bill, which motion was sustained, and the railroad company brings the case here for review.

Under an act of Congress (14 Stat. 292), the railroad company was granted by the government lands described therein. The act provides that where lands are lost to the company for any of the reasons mentioned in it, other lands may be selected by the railroad in lieu thereof, "under the direction of the Secretary of the Interior". The lands lost are called "base" and those selected in their stead "lieu". In 1903 the railroad company filed a selection of lieu lands and designated other lands as base for them. It developed that the lands tendered as base were not within the primary limits of the grant, and hence were not good base. Later, in 1918, the company offered in substitution for the invalid base, lands consisting of two tracts of 40 acres each, one of 10 acres, and one of 5 acres. The commissioner

declined to accept the base, for the stated reason that parts of a legal subdivision are not proper bases for making lieu selections, unless the entire legal subdivision is offered in the same list; and his action was affirmed by the Secretary.

The bill asserts that if the relief sought is not granted the contract effected between the company and the government by the granting act will be breached and the company will, in consequence, suffer irreparable loss, damage and injury.

On the other hand, counsel for the appellees urged that the practice in pursuance of which the selection was rejected is of long standing in the land department; that it was adopted by the Secretary because in his judgment it was the best method by which to guard against errors and to facilitate the keeping of accurate accounts with the land grant railroads; that under it one can tell at any time by a glance of the eye "what legal subdivisions of lost base have been used in making lieu selections"; that to change the method now to conform with the views of the railroad company would be unwise, and would involve a radical departure from the present system of bookkeeping in that division of the department which has to do with the handling of railroad land selections. They point to the provision of the granting act which says that selections shall be made "under the direction of the Secretary of the Interior", and argue that the Secretary is thereby authorized to make such reasonable regulations touching the matter as he may deem proper. They add that the bill does not disclose that any substantial right of the railroad company is affected by the action of the defendants and that the contest is simply whether the method adopted by the Secretary or the one suggested by the railroad company is the better.

The claim that irreparable injury will result to the company is bottomed upon the charge that the Secretary's action violates the terms of the grant. The bill alleges nothing else, not even that the railroad company will be inconvenienced thereby, although counsel argues that it would.

We do not think the rulings of the Secretary violate the grant. He did not refuse to give the railroad company lieu lands for proper base, but simply provided that in tendering the base the company must follow a prescribed course,—must not tender fractions of 40 acre tracts, that being the smallest legal subdivision known to the public land laws (Rev. Stat., sec. 2397), except in case of mining claims and lands peculiarly situated. If the rulings assailed prevented the company from utilizing the base lands here involved so that the company would be thereby deprived of a part of its grant, we would have a different question, but that is not so in the case before us. Possibly instances may arise under the rulings mentioned when that would happen. When they do it will be time enough to dispose of them. At this time we can pass only on the case before us.

Moreover, we are satisfied that the rulings we are considering, as they affect this case, are merely matters of administration committed by Congress to the sound discretion of the Secretary, and, as such, are not subject to the control of the courts. As was said in Decatur v. Paulding, 14 Pet. 497, 515, "The interference of the courts with

the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied, that such a power was never intended to be given to them." See also United State Ex Rel. Ashley v. Roper, 48 App. D. C. 69, 76, and cases there cited.

We can discover no error in the judgment, and it is therefore affirmed at the cost of the appellant.

Affirmed.

Monday, March 1st, A. D. 1920.

No. 3300, January Term, 1920.

SOUTHERN PACIFIC RAILROAD COMPANY, a Corporation, Appellant,

vs.

FRANKLIN K. LANE, Secretary of the Interior, and CLAY TALLMAN, Commissioner of the General Land Office.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per MR. CHIEF JUSTICE SMYTH,
March 1, 1920.

(Mr. Justice Robb did not sit in this case.)

Court of Appeals of the District of Columbia, October Term, 1919.

No. 3300.

SOUTHERN PACIFIC RAILROAD COMPANY, a Corporation, Appellant,

vs.

FRANKLIN K. LANE, Secretary of the Interior, and CLAY TALLMAN, Commissioner of the General Land Office, Appellees.

Petition for Allowance of Appeal.

Comes now the Southern Pacific Railroad Company, a corporation, appellee in the above-entitled cause, and shows that on or about the first day of March, 1920, this Court entered a decree herein in favor of the appellees and against the appellant, affirming a decree of the Supreme Court of the District of Columbia in favor of said appellees, in which decree of this Court certain errors were committed to the

prejudice of the appellant; all of which will more fully and in detail appear from the assignments of error filed with this petition.

The appellant further shows that the said decree of this Court is subject to review by the Supreme Court of the United States under the provisions of the first paragraph of Section 250 of the Judicial Code, in that the jurisdiction of the trial court is in issue.

It further shows that said decree is subject to review by the Supreme Court of the United States under the provisions of the fifth paragraph of said Section 250, in that the validity of an authority exercised under the United States and the existence and scope of a power or duty of the appellees, said appellees being officers of the United States, are drawn in question; the said appellees, in construing and interpreting the terms and provisions of certain acts of Congress, having assumed and exercised an alleged authority, power and duty in such manner and way as to deprive appellant of its vested property rights in and to the lands described in the proceedings herein.

It further shows that said decree is subject to review by the Supreme Court of the United States under the provisions of the sixth paragraph of said Section 250, in that the proper construction of the acts of Congress under which appellant claims is drawn in question by the appellees, who were defendants below; and that said appellees, by their construction of said acts of Congress, have assumed and exercised an authority in such manner and way as to deprive appellant of its vested property rights in and to said lands.

Wherefore, appellant prays the allowance of an appeal removing this case to the Supreme Court of the United States for the correction of the errors complained of; and that a transcript of the record, proceedings, and papers in the cause, duly authenticated, may be sent to the Supreme Court of the United States.

SOUTHERN PACIFIC RAILROAD COMPANY,
By A. A. HOEHLING, JR., *Its Attorney.*

Endorsed: No. 3300. Southern Pacific R. R. Co., Appellant, vs. Franklin K. Lane, Secretary &c. et al. Petition for allowance of appeal to Sup. Ct. U. S. Court of Appeals, District of Columbia, Filed May 4, 1920. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia, October Term, 1919.

No. 3300.

SOUTHERN PACIFIC RAILROAD COMPANY, a Corporation, Appellant,

vs.

FRANKLIN K. LANE, Secretary of the Interior, and CLAY TALLMAN, Commissioner of the General Land Office, Appellees.

Assignments of Error.

Comes now the appellant, by its attorney, and says that in the record and proceedings of the Court of Appeals in the above-entitled

cause, and in the entry of the final decree therein, manifest error has intervened to the prejudice of said appellant, in this:

1. In affirming the decree of the Supreme Court of the District of Columbia in favor of the appellees and against the appellant.

2. In failing to reverse the decree of the Supreme Court of the District of Columbia adverse to appellant and in favor of the appellees.

3. In holding that the selection made by appellant of the lands involved in this suit, the same being non-mineral in character, designated by odd-number, within the indemnity limits of the railroad grant, of the character subject to such selection, and needed in partial satisfaction of the grant, and in support of which selection appellant has designated valid base; nevertheless, is to be defeated and rejected because the base so designated, while susceptible of precise and exact identification upon the land records of the Department of the Interior, is less, in the aggregate, than an entire forty (40) acre legal subdivision.

4. In upholding the right claimed and exercised by appellees to reject arbitrarily a selection of indemnity lands to which appellant is lawfully entitled, the selection being supported by the designation of valid and legal base, merely because of the fact that the base so designated is less, in the aggregate, than an entire forty (40) acre legal subdivision.

5. In upholding the right claimed and exercised by appellees to impair and lessen the indemnity grant of appellant by insisting arbitrarily that base designated in support of an indemnity selection shall not be less, in the aggregate, than an entire forty (40) acre legal subdivision; thereby placing a limitation upon the right of indemnity selection not warranted by the granting act.

6. In holding that the rulings made by appellees, and of which complaint is made herein, are mere matters of administration committed by Congress to the sound discretion of the Secretary of the Interior, and, as such, not subject to the control of the courts.

7. In sustaining rulings of appellees requiring appellant to surrender part of its land grant by surrendering 120 acres of base or primary land for 99.46 acres of indemnity land which appellant is entitled to under said grant; or, on the other hand, to surrender its right to said 99.46 acres of indemnity land, to which it is entitled under said land grant, by reason of the fact that there are no legal subdivisions of such base or primary lands containing exactly or even approximately 99.46 acres.

SOUTHERN PACIFIC RAILROAD COMPANY,
By A. A. HOEHLING, JR.,
Its Attorney.

Endorsed: No. 3300. Southern Pacific R. R. Co., Appellant, vs. Franklin K. Lane, Secretary &c. et al. Assignments of Error. Court of Appeals, District of Columbia. Filed May 4, 1920. Henry W. Hodges, Clerk.

36 Thursday, May 6th, A. D. 1920.

No. 3300.

SOUTHERN PACIFIC RAILROAD COMPANY, a Corporation, Appellant,

vs.

FRANKLIN K. LANE, Secretary of the Interior, and CLAY TALLMAN, Commissioner of the General Land Office.

On consideration of the petition for the allowance of an appeal to the Supreme Court of the United States in the above entitled cause, it is by the Court this day ordered that said appeal be, and the same is hereby allowed, and the bond to act as supersedeas is fixed at the sum of three hundred dollars.

37 (*Bond on Appeal*)

Know all men by these presents, that we, Southern Pacific Railroad Company, a corporation, as principal, and United States Fidelity and Guaranty Company, a Corporation, of the State of Maryland, as surety, are held and firmly bound unto Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, in the full and just sum of Three Hundred dollars, to be paid to the said Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, their successors in office, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 8th day of May, in the year of our Lord one thousand nine hundred and twenty.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between said Southern Pacific Railroad Company, a corporation, and said Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, a decree was rendered against the said Southern Pacific Railroad Company, such corporation aforesaid, and the said Southern Pacific Railroad Company having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, that if the said Southern Pacific Railroad Company, such corporation aforesaid, shall prosecute said appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

SOUTHERN PACIFIC RAILROAD COMPANY. [SEAL.]
By A. A. HOEHLING, Jr., [SEAL.]
Its Attorney.
UNITED STATES FIDELITY AND GUARANTY COMPANY, [SEAL.]
By CHAS. R. HOOFF, [SEAL.]
Attorney in Fact.

[Seal of United States Fidelity and Guaranty Company.]
Sealed and delivered in presence of—
LEE. B. MOSHER.
Approved by:
CONSTANTINE J. SMYTH,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 3300. Southern Pacific Railroad Company, a Corporation, Appellant, vs. Franklin K. Lane, Secretary of the Interior et al. Supersedeas Bond on Appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed May 10, 1920. Henry W. Hodges, Clerk.

38 UNITED STATES OF AMERICA, *ss:*

To Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Southern Pacific Railroad Company, a corporation, is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Constantine J. Smyth, Chief Justice of the Court of Appeals of the District of Columbia, this 10th day of May, in the year of our Lord one thousand nine hundred and twenty.

CONSTANTINE J. SMYTH,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 11th day of May, A. D. 1920.
C. EDWARD WRIGHT,
Attorney for Appellees.

[Endorsed:] Court of Appeals, District of Columbia. Filed May 11, 1920. Henry W. Hodges, Clerk.

39 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 38 inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Southern Pacific Railroad Company, a Corporation, Appellant, vs. Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office. No. 3300, January Term, 1920, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 14th day of May, A. D. 1920.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

Endorsed on cover: File No. 27,693. District of Columbia Court of Appeals. Term No. 938. Southern Pacific Railroad Company, Appellant, vs. Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office. Filed May 18th, 1920. File No. 27,693.

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JAMES D. MAHE
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1921

No. 60

Sweetser Pacific R. R. Co., *Appellant*

vs.

Albert B. Fall, Secretary of the Interior

and

William Finch, Commissioner of the General Land Office

Brief for Appellant

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1921
No. 60

SOUTHERN PACIFIC R. R. CO., *Appellant*
vs.
ALBERT B. FALL, *Secretary of the Interior*
AND
WILLIAM SPRY, *Commissioner of the General Land Office*

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

This is a suit brought by the Southern Pacific Railroad Company, a corporation, against Franklin K. Lane, as Secretary of the Interior, and Clay Tallman, as Commissioner of the General Land Office, to enjoin and restrain said public officials from enforcing certain rulings, holdings, and decisions mentioned in the bill of complaint, and concerning a selection of what is called "indemnity land," and from rejecting certain indemnity selections made and filed under the provisions of an Act of Congress, approved July 27, 1866 (14 Stat., 292), one of the so-called land grant acts.

The company named is the owner of a grant of land made by said act of July 27, 1866, and a Joint Resolution, approved June 28, 1870 (16 Stat., 382), under the terms of which, in consideration of the construction of a railroad line from a point near the eastern boundary line of the State of California to San Francisco, and other considerations therein stated, as well in aid of such construction, there was granted to the railroad company, its successors and assigns, every *alternate* section of public land, not mineral, designed by *odd* numbers, to the amount of twenty sections per mile on each side of the railroad line, through the Territories, and ten sections per mile on each side of the railroad through the States; and as to which the United States had full title. This is what is known as the primary grant. (R. 3).

Realizing that certain of the lands within the primary limits doubtless would be lost to the grant by reason of prior lawful claims, or because mineral in character, the granting act provided, further, that the company might select, under the direction of the Secretary of the Interior, in lieu of lands so lost, other lands in alternate sections, designated by odd numbers, not more than ten miles beyond the limits of the primary grant, and not including the reserved numbers. This is what is known as the indemnity grant. (R. 3).

The plain intent of the granting act is that the railroad grantee shall have indemnity lands, acre for acre, equal in amount to the lost primary lands.

In the present case, the railroad company filed its certain indemnity selection list No. 97, in the United States local land office at Los Angeles, California, on April 23, 1903, wherein selection was made by it of certain lands within the indemity limits of its main line grant, the list embracing, *inter alia*, Frl. N½ NE¼, Section 1, T. 5 N., R. 7 W., S. B. M., California, containing 99.46 acres, and designated

as base therefor and in support of said selection, certain land, the description of which is not here important. The selection was duly certified by the Register and Receiver of the local land office named, on April 23, 1903, and transmitted thereafter in accordance with the rules, regulations and practice of the Department of the Interior, to the Commissioner of the General Land Office for appropriate consideration and the ultimate patenting to the company of the lands embraced therein (R. 6-7).

No action was taken by the Commissioner of the General Land Office with respect to the particular tract of land above described until March 20, 1918, when said list No. 97 was held for cancellation as to said Frl. N½ NE¼ Sec. 1, T. 5 N., R. 7 W., S.B.M., containing 99.46 acres, for the reason that the base tracts designated therefor were not within the primary limits of the grant to the railroad company, as shown by the (then) official diagram of said limits on file in the General Land Office, and so, as therein held, were not proper and valid bases for indemnity selection. Said decision, however, gave the company the right, within thirty days, to substitute good and valid base for said selection (R. 7, 15).

The company, availing itself of the right to designate other base, on April 18, 1918, requested that it be allowed to substitute in lieu of the base originally described and held to be invalid, the SE¼ SW¼ (40 acres), NE¼ SE¼ (40 acres), NE¼ NW¼ SE¼ (10 acres), and E½ NW¼ NW¼ SE¼ (5 acres) of Sec. 15, T. 23 S., R. 22 E., M. D. M., California, aggregating 95 acres (R. 7, 16).

The Commissioner of the General Land Office, concluding that the land sought to be selected was properly subject to selection by the company as indemnity, and that the entire Section 15, *supra,* (part of which was designated as base in support of the selection, as above), was valid and legal base

for indemnity selection by the appellant company, nevertheless, on July 17, 1918, declined to accept the two parts of said section, 10 acres and 5 acres, respectively, *supra*, because each such piece or parcel of the section was less than a legal subdivision of such section (the smallest so-called "legal subdivision" containing 40 acres); and, accordingly, held the selection for rejection, and upon the ground stated above, citing in support thereof the then unpublished decision of the Department of the Interior, dated January 19, 1918, now 46 L. D. 279 (R. 8, 17-20).

The holding of the Commissioner was affirmed on appeal by the Secretary of the Interior, December 5, 1918, (R. 8, 21). Whereupon, to-wit May 15, 1919, a bill was filed in the Supreme Court of the District of Columbia by the appellant company to enjoin and restrain the Secretary of the Interior and the Commissioner of the General Land Office, respectively, from rejecting the selection list aforesaid insofar as such action might be based upon the above holding—not, of course, seeking to interfere with either of the public officials named in respect of any action on the list affecting the legality and validity of the selection or of the base designated in support thereof, except only as to the single matter above stated. (R. 10).

Upon the filing of the above bill rule to show cause issued, and return to said rule was made by the defendants, as well also a motion to dismiss was filed by them, based upon the ground that the matter mentioned is one of mere administration of Federal law, the details and conduct of which are within the exclusive jurisdiction of the defendants; and that the relief sought involves judicial interference with and control of a matter within the exclusive jurisdiction of the defendants and involving the exercise of their judgment and discretion.

That motion was sustained; final decree was entered dis-

missing the bill, and, thereupon, appeal was taken by the company to the Court of Appeals of the District of Columbia, which affirmed the decree of the trial court. (R. 22-29).

From the judgment of the Court of Appeals, the present appeal was taken (R. 30); the appellant company relying upon the following:

ASSIGNMENTS OF ERROR

1. In affirming the decree of the Supreme Court of the District of Columbia in favor of the appellees and against the appellant.

2. In failing to reserve the decree of the Supreme Court of the District of Columbia adverse to appellant and in favor of the appellees.

3. In holding that the selection made by appellant of the lands involved in this suit, the same being non-mineral in character, designated by odd numbers, within the indemnity limits of the railroad grant, of the character subject to such selection, and needed in partial satisfaction of the grant, and in support of which selection appellant has designated valid base; nevertheless is to be defeated and rejected because the base so designated while susceptible of precise and exact identification upon the land records of the Department of the Interior, is less, in the aggregate, than an entire forty (40) acre legal subdivision.

4. In upholding the right claimed and exercised by appellees to reject arbitrarily a selection of indemity lands to which appellant is lawfully entitled, the selection being supported by the designation of valid and legal base, merely because of the fact that the base so designated is less in the aggregate, than an entire forty (40) acre legal subdivision.

5. In upholding the right claimed and exercised by appellees to impair and lessen the indemnity grant of appellant by insisting arbitrarily that base designated in support of an indemnity selection shall not be less in the aggregate, than an entire (40) acre legal subdivision, thereby placing a limitation upon the right of indemnity selection not warranted by the granting act.

6. In holding that the rulings made by appellees, and of which complaint is made herein, are mere matters of administration committed by Congress to the sound discretion of the Secretary of the Interior, and as such not subject to the control of the courts.

7. In sustaining rulings of appellees requiring appellant to surrender part of its land grant by surrendering 120 acres of base or primary land for 99.46 acres of indemnity land which appellant is entitled to under said grant; or, on the other hand, to surrender its right to said 99.46 acres of indemnity land, to which it is entitled under said land grant, by reason of the fact that there are no legal subdivisions of such base or primary lands containing exactly or even approximately 99.46 acres.

THE QUESTION INVOLVED

The ultimate question involved in this suit may be summarized as follows:

The railroad company appellant contends that its right to perfect an indemnity selection, otherwise regular, of a tract of land, non-mineral in character, within the indemnity limits of its grant, needed in partial satisfaction of its grant, and in support of which it has designated base admittedly valid in character, shall not be defeated because part of the base so designated, which is susceptible of precise and exact identification in the records of the Land De-

partment, is less in the aggregate than a legal subdivision; that the right claimed and exercised by the appellees to reject such selection impairs and lessens the indemnity grant of the appellant and places a limitation upon the right of indemnity selection not warranted by the granting act; and that the rulings of the appellees of which complaint is made, are not matters of administration subject to the sound discretion of the Secretary of the Interior, but constitute an arbitrary and unwarranted exercise of authority, not warranted by the indemnity provisions of the granting act.

The appellees, on the other hand, contend that the proceeding complained of is merely a matter of administrative detail which, while it may work hardship upon the railroad company, unless it operates to defeat a substantial right, is not a matter in which the courts will interfere; that, if appellant's contentions were recognized and adopted, the present system of record in the Land Department would not be adequate and would require a large amount of bookkeeping, and that "good administration" (which, it is contended no one is in a better position to determine than the Secretary) does not require or justify such a "fundamental change."

The Land Grant

By act of Congress, approved July 27, 1866 (14 Stat., 292), entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast," authority was given to the Southern Pacific Railroad Company of California to construct a railroad and telegraph line, upon and under the certain conditions and stipulations expressed in the act, to extend from a connection with the Atlantic and Pacific Railroad at a point near the eastern boundary

line of the State of California, by the most suitable route to San Francisco. Said act contained a grant of lands to the companies named therein, including specifically said Southern Pacific Railroad Company of California, said grant in Section 3 of the Act, being worded thus:

> "every alternate section of public lands, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passed through any State," etc.

The above constitutes the grant of *primary* or *place* lands. (R. 3).

Said section then proceeded thus:

> "and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers;" etc.

The above constituted the *indemnity* grant.

Section four of the act provides for the issuance of patents upon the completion of sections of twenty-five consecutive miles of road ready for the service contemplated, upon reports thereof made to the President of the United States by three commissioners to be appointed by him, such patents to be for lands situate opposite to coterminous with the completed sections of the road.

By section eleven of the act the following provision was made:

> "And be it further enacted, That the Southern Pa-Pacific railroad, or any part thereof shall be a post route and military road, subject to the use of the United States for postal, military, naval and all other government service, and also subject to such regulations as Congress may impose restricting the charges for such government transportation."

By section eighteen of said act it was provided as follows:

> "And be it further enacted, That the Southern Pacific railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point near the boundary line of the State of California as they shall deem most suitable for a railroad line to San Francisco; and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific railroad herein provided for."

The said Southern Pacific Railroad Company of California duly accepted the grant so made to it in said act, and duly filed in the office of the Secretary of the Interior its written assent thereto. By a certain joint resolution of the Congress of the United States, approved June 28, 1870, (16 Stat., 382), it was provided that said Southern Pacific Railroad Company of California might construct its road as near as might be on the route indicated by the map filed in the Department of the Interior on January 3, 1870, and that upon the construction of each section of

said road in the manner and within the time provided by said act of July 27, 1866, patents should be issued to said company for the sections of land coterminous to each constructed section.

The company duly constructed, completed and equipped a line of railroad in the manner prescribed by said granting act and joint resolution, *supra*, from San Jose to The Needles, on the Colorado River, except that portion thereof between Tres Pinos and Alcalde, declared forfeited by the Act of Congress of September 29, 1890, (26 Stat., 496); and said constructed line was duly accepted by the President of the United States, after the filing of sworn reports by commissioners as required by the granting act and joint resolution aforesaid. The Southern Pacific Railroad Company, appellant herein, is the legal successor in interest, (by consolidation), of said Southern Pacific Railroad Company of California, and by reason thereof, has become the legal successor in interest of all and singular the rights, titles, properties and franchises of the corporation last named, including the certain land grant so made as above mentioned.

By the provisions of a certain other act of Congress approved March 3, 1887, (24 Stat., 556), the Secretary of the Interior was "authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted;" and although the fact is that the railroad of said Southern Pacific Railroad Company, provided for in said granting act of July 27, 1866, *supra*, has been fully constructed, equipped and operated for a great many years, with all of the incidental benefits to the United States, as fixed and provided by said granting act, the land grant itself remains unadjusted. (R. 5-6).

BRIEF

1

The Statutory Contract Effected by the Land Grant Act of July 27, 1866

The granting act of July 27, 1866, *supra*, and the joint resolution of June 28, 1870, *supra*, constituted a contract between the United States and the said Southern Pacific Railroad Company of California (to the rights of which company the appellant company has succeeded), which contract is one from which the company cannot depart and which the Government cannot change or alter, except in the mode reserved to it by law. Sinking Fund Cases, (99 U. S. 700, 718-9).

The indemnity grant therein contained was and is as much a part of said statutory contract as the grant of primary or place lands therein and thereby made. It was the purpose of Congress in making the grant to confer a substantial right to lands within the indemnity limits in lieu of land lost within the place limits. Weyerhaeuser vs. Hoyt (219 U. S., 380, 387).

In the case of Burke vs. Southern Pacific R. R. Co. (234 U. S., 669, 680), wherein the land grant here in question was under consideration, this Court, in its opinion, referring to the contention there advanced that the grant was a gift and should be construed and applied accordingly, stated as follows:

> "The granting act not only does not support the contention but refutes it. The act did not follow the building of the road but preceded it. Instead of giving a gratuitous reward for something already done, the act made a proposal to the company to the effect that,

if the latter would locate, construct and put into operation a designated line of railroad, patents would be issued to the company confirming in it the right and title to the public lands falling within the descriptive terms of the grant. The purpose was to bring about the construction of the road, with the resulting advantages to the Government and the public, and to that end provision was made for compensating the company, if it should do the work, by patenting to it the lands indicated. The company was at liberty to accept or reject the proposal. It accepted in the mode contemplated by the act and thereby the parties were brought into such contractual relations that the terms of the proposal became obligatory on both. Menotti vs. Dillon, 167 U. S., 703, 721. And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the Government. In other words, it earned the right to the lands described. Of course, any ambiguity or uncertainty in the terms employed should be resolved in favor of the Government but the grant should not be treated as a mere gift."

2

THE SYSTEM OF GOVERNMENT SURVEYS

The public lands of the United States are laid out with reference to what is known as the rectangular system, and which really began with an ordinance passed by the Continental Congress in 1785, which provided for townships six miles square, each containing 36 sections of one mile square, the sections being numbered from 1 to 36.

Various acts of Congress have passed during the years, (May 18, 1796; May 10, 1800; February 11, 1805; February 22, 1817; April 24, 1820; May 29, 1830; April 5, 1832; July 9, 1870; May 10, 1872;) the substance and result of which are to divide townships into sections, and the latter into half-sections, quarter-sections, half-quarter sections and

quarter-quarter-sections—the latter normally containing 40 acres and being the smallest legal subdivision, so far as exact description thereof is found in the acts of Congress; although some of such acts have provided for the subdivision of the public lands into less than 40 acres by reason of special existing physical conditions; and, in the Act of July 9, 1870, relating to placer mines, it was provided that legal subdivisions of 40 acres might be subdivided into 10-acre tracts, "no further survey in such case being required."

Then, too, authority has been given to survey *irregular* tracts into lots, giving each a lot number. This provision ordinarily relates to tracts which are less than 40 acres, and which, because of irregularity in dimension and shape, could not otherwise be precisely identified or described. In practice, however, it sometimes happens that these irregular tracts are shown to contain more than 40 acres. For example, the tract here in question is described as the Frl. N½ NE¼ Sec 1, T. 5 N, R. 7, W., 99.46 acres, each subdivision containing more than 40 acres.

The quarter-section (160 acres) is the smallest legal subdivision that is actually surveyed on the ground; the half-quarter-section (80) acres) and the quarter-quarter-section (40 acres) being merely platted by the draftsmen on the diagrams or plats of survey. The surveyor in running the lines in the field, sets the section corner posts on the exterior lines of each section, and also the quarter section posts, which are shown on the diagram or plat of the survey. The latter are connected by imaginary lines bisecting each other at the center of the section. The quarter-quarter sections are merely platted by the draftsmen by joining points midway between the corner posts and quarter-section posts with like imaginary lines marking off the forty acre tracts.

From what has been stated, and bearing in mind that the

smallest ordinary and normal legal subdivision, described in the several acts of Congress with reference to the rectangular system, is a quarter-quarter-section, containing 40 acres, (but which latter, as above explained, is not surveyed or marked on the ground, but merely platted on the diagram sheet,) it results that it is quite as susceptible of exact descrip and identification to further subdivide the quarter-quarter-section by rectangular lines as it is to subdivide by the same method the quarter-section into quarter-quarter-sections.

In other words, there could be no uncertainty as to the exact location of the North or South half of a quarter-quarter-section, or the East or West half of a quarter-quarter-section, etc.

3

INDEMNITY SELECTIONS

Prior to the year 1879, it seems to have been the practice of the Department to allow the selection of indemnity lands without a specification of the losses on account of which such selections were claimed; but, by Circular Instructions, dated November 7, 1879, the matter was attempted to be put in more definite form, and the grantee company was required to designate in the selection list the specific tracts for which the lands selected are claimed.

Other and similar instructions were issued by the Department during the years, but, it appearing that there had not been a general compliance therewith, and that much confusion had resulted, the Department, on October 14, 1893, (La Bar vs. Northern Pacific R. R. Co., 17 L. D. 406, 410), directed the Commissioner of the General Land Office to call upon *all* railroad companies to revise and arrange their indemnity selection lists—

"so that a proper basis will be shown for each and all lands now claimed as indemnity, the same to be arranged tract for tract in accordance with Departmental requirements."

It appears from an examination of the La Bar case, *supra*, that prior to the date thereof the General Land Office had been obligingly rearringing the companies' lists, in preparing clear lists for approval, so as to meet the departmental requirement that the losses be specifically designated for the selected tracts in the clear lists submitted as bases for patents, and it was to put an end to the confusion arising from this practice that the order above stated was made. It nowhere appears in said decision that the companies were prohibited from designating a tract less than forty acres in area for a selected tract less than forty acres in extent, and the application of the so-called rule of approximation in relation to indemnity selections had its origin in later departmental practice.

The so-called rule of approximation had its original application to cases of homestead entries involving subdivisions in two or more quarter-sections. It is held by the Secretary of the Interior that when the excess above 160 acres is less than the deficiency would be if the subdivision were excluded, such subdivision may be included in the homestead entry; where it is greater it must be excluded. Henry P. Sayles, 2 L. D., 88; Whitcher vs. Southern Pacific R. R. Co., 3 L. D., 459; Wm. C. Elson, 6 L. D., 797.

The rule was later applied to railroad selections and it was held that the difference between the base and the selection should approximate the area of the smallest legal subdivision. Florida Central and Penn. R. R. Co., 15 L. D., 529; Bull vs. Northern Pacific R. R. Co., 26 L. D., 693.

In the case of Northern Pacific Railway Co., et al., (43 L. D. 534), this rule of approximation was applied to each

item of the railroad selection there under consideration. It was stated by the Secretary (p. 535), that there was no statutory authority for the rule originally invoked in homestead entries only, but that there appeared to be no good reason why it could not be used to meet emergencies in any class of entries or selections.

In the case of Southern Pacific Railroad Company (46 L. D., 279), the application of the rule of approximation to railroad selections was again asserted and it was held that, while under ordinary circumstances, each item of a railroad selection list should be considered and disposed of, unaffected by the facts shown in other items, an exception would be made where, in a tendered list made up of several items, the aggregate area of the tracts severally designated as bases forms a sufficient base for the total acreage asked in exchange.

Indemnity selections are made under the direction of the Secretary of the Interior, and the enforcement of any requirement in the matter of a specification of a loss is only for his information, as a bar to the enlargement of the grant, and an aid in the adjustment thereof. Case of William Hickey, (26 L. D., 621); Jones vs. Northern Pacific Ry. Co., (34 L. D., 105).

The duty of the Secretary is to supervise the administration of the grant, but this authority does not permit him to abridge or enlarge the laws of Congress. Jones vs. Northern Pacific Ry. Co. *supra.*

In the said departmental decision of January 19, 1918, 46 L. D., 279, *supra,* the ruling announced in the Hickey case, *supra,* was cited in support of the departmental ruling therein made that parts of the same legal subdivision could be assigned as bases for selected tracts containing a less area than forty acres each, provided that all of the subdivisions designated as base be used in the same selection

list. It so happened that the selected tracts there in question were all apparently subject to indemnity selection, no objection thereto being found in the decision appealed from other than that pertaining to the fractional character of the base. Suppose that the company, relying upon said ruling, selected other irregular tracts for which it designated parts of a legal subdivision as base, amounting in the aggregate to a forty acre subdivision, and, in the course of the examination and administration of the grant, so far as it related to such selection, it was found that one of the tracts was not subject to selection and the selection thereof must be canceled; would the Secretary hold *arbitrarily* that the selection of the remaining tracts, otherwise regular and subject to appropriation must fail because all of the legal subdivision designated as base was not used in support of the valid selections, or would he, in the further exercise of his *discretion,* extend the ruling of January 19, 1918, so as to cover such a contingency and hold such remaining selections to be valid? The question is important in such a grant as that to the Southern Pacific Railroad Company, lying, as it does, entirely in the State of California and traversing regions extensively mineralized, where numerous tracts are made fractional by mineral segregation surveys, separating the mineral from the agricultural lands. It surely would be an *arbitrary* exercise of the*discretionary* power of the Secretary and a *substantial diminution of the railroad company's grant* to require it in each instance to designate an entire forty acre subdivision of base lands for each irregular tract selected, because there might be no legal subdivisions of base or primary lands, lost to the grant, containing exactly or even approximately the same acreage.

There is no statute or regulation prohibiting the designation of base in less than a full minor legal subdivision, nor any good reason why the same should not be permitted.

The Departmental decision herein says that "good administration will not permit the acceptance of a portion of a legal subdivision," (R. 22;) but no reason therefor is stated, and none is apparent.

The Department, of course, is properly interested in knowing that a tract once designated as base should not be so used again; but where, as here, a tract designated as base is so precisely identified and described that it could be located instantly and at any time in the future, no conceivable valid reason exists for rejecting the base so designated.

That the so-called "good administration" does not really stand in the way of permitting the designation as base of parts of the smallest legal subdivision, Departmental Circular, of June 23, 1910, is both illuminating and instructive. That Circular contains regulation governing the selection of lands by the States and Territories under grants for educational and other purposes, and in paragraph 4 thereof it is thus provided:

> "4. The assignment of a portion of the smallest legal subdivision of a school section as the basis, in whole or in part, for indemnity selections, is permitted; but such assignment is an election by the State or Territory to take indemnity for the entire subdivision, and is a waiver of its right to such subdivision, and any remaining balance must be used for future selections." (39 L. D., 39.)

The rights of a State in respect of indemnity selections for school sections are not materially different from the rights of a railroad grantee; and if the State is permitted to designate "a portion of the smallest legal subdivision of a school section as the basis, in whole or in part, for indemnity selections," as it is, (*supra,*) and as the records of the General Land Office disclose it does, there certainly can be no valid reason for rejecting the designation by a

railroad grantee of a regular subdivision of a 40-acre tract.

If "good administration" so permits in the one case, it should follow in the other as a matter of course. It surely cannot be good in the one case, and bad in the other, where both situations are substantially identical.

It is assumed that the appellees will not undertake to deny that very many dispositions of lands have been made by the Department of regular portions of the minor legal subdivisions and by description entirely similar to that here present.

So that the action complained of herein cannot be defended upon the asserted ground of inconvenience or good administration.

As a matter of fact the application of any such rule as has been asserted in this case works both an inconvenience and a hardship upon the railroad company; thus all of the so-called minor regular subdivisions are not of equal areas, some are more and some less than the regular 40 acres. In selecting such a subdivision, (containing in excess or less than the normal 40 acres, as the case may be), the company might not, probably would not, have a base tract of exactly the same acreage, or one which would be acceptable even under the rule of approximation.

Or suppose 10 acres of a quarter-quarter-section (40 acres) within the indemnity limits have been patented under a mineral entry, and that the company desires to make selections of the remaining 30 acres.

Or suppose the company desires to select as indemnity a duly surveyed lot containing 5 or 10 acres, as the case may be, (and there are many such in the Government surveys), the desired selection must fail under the rule here invoked against appellant because the base designated for such selection would necessarily be less than a full legal subdivision of 40 acres; unless, perchance, the company

should be fortunate enough to find some other surveyed lot of that acreage which it had lost from the grant, but which would be improbable, to say the least.

Again, the particular land desired to be selected by the company as indemnity may only be open for such selection for a brief period; and it may, also, be that other indemnity lands in areas equivalent to the remaining base may not be then available, or, perhaps, not desirable from the company's standpoint.

While ordinarily the identity selection and designation of base in support thereof are made in conventional subdivision; occasionally conditions arise and exist, (of which the above are suggested as examples), which would operate to deprive the grantee of portions of its grant if base less than a full minor subdivision is to be rejected.

4

THE CLAIM OF APPELLANT

Counsel for appellant are not unmindful of the fact that these railroad indemnity selections are required to be made "under the direction of the Secretary of the Interior," and that if the question here involved related merely to a matter of office administration where the Secretary thought that an act should be done one way and the railroad company thought it should be done some other way, there probably would be no right to appeal to the judgment of a court as a third party to say that one of the other of the two methods was the better practice or manner of reaching the desired result.

The question is a much broader one than that, since it involves not merely a mere matter of administration but one of absolute right on the part of the railroad grantee to a tract or tracts of indemnity land selected by it.

That the power of supervision and direction lodged in the Secretary is not an unlimited or arbitrary power has been decided by this Court in a number of cases. In Cornelius vs. Kessel, 128 U. S. 456, 461, the rule was stated thus:

> "the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secured a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it." (p. 461).

Again, in the case of Garfield, Secretary of the Interior, vs. Goldsby (211 U. S., 249, 262), the same doctrine was stated thus:

> "there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the power conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action."

In Ballinger, Secretary of the Interior, vs. Frost (216 U. S., 240, 249), the following statement was made:

> "Whenever, in pursuance of the legislation of Congress, rights have become vested, it becomes the duty of the courts to see that these rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a department. However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of congressional legislation."

In the recent case of Payne, Secretary of the Interior, et al., appellants, vs. Central Pacific Railway Company, No. 17, October Term, 1920, this Court spoke with reference to the supervision and direction of the Secretary of the Interior as follows:

> "The selections are to be made by the grantee, not by the Secretary of the Interior. True, the act provides that they shall be made under the Secretary's direction, but this merely applies to them the general rule, announced in Rev. Stat., Secs. 441, 453, 2478, that the administrative execution of all public land laws is to be under his 'supervision' and 'direction.' Catholic Bishop of Nesqually vs. Gibbon, 158 U. S., 155, 166. Its purpose is to make sure that, in accord with that power of supervision and direction, he is to see to it that the right of selection is not abused, that claims arising out of prior settlement and the like are not disturbed, and that no indemnity is given except for actual losses of the class intended, and that the lands selected are such as are subject to selection. But of course it does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress as manifested in the granting act. Cornelius vs. Kessel, 128 U. S., 456, 461; Orchard vs. Alexander, 157 U. S., 372, 383; Williams vs. United States, 138 U. S., 514, 524; Daniels vs. Wagner, 237 U. S., 547, 557-561; Northern Pacific Ry. Co. vs. McComas, 250 U. S., 387, 392-393. The cases cited as making for a different conclusion respecting the Secretary's discretion were examined and that view of them rejected in Weyerhaeuser vs. Hoyt, 219 U. S., 380, 387-388, and Daniels vs. Wagner, 237 U. S., 547, 557-561. In the Weyerhaeuser case it was held that the authority conferred on the Secretary respecting the selection of indemnity lands involved not only the power but implied the duty to determine the lawfulness of the selections as to the time when the exertion of the authority was involved by the lawful filing of the list of selections."

As stated by the Chief Justice in the Weyerhaeuser case, *supra*:

> "The requirement of approval by the Secretary consequently imposed on that official the duty of determining whether the selections were lawful at the time they were made."

In short, the granting act, in its provision that indemnity selections shall be made under the *direction* of the Secretary of the Interior, did no more than put in words that which would have been implied and applied even if not stated, since the Secretary of the Interior is charged with the administration of the public land laws, and, of course, he is the one who necessarily must have the authority and the right to ascertain and require that all selections be lawfully made. No question whatever is here raised as to the absolute right of the Secretary to pass upon the *validity* of an application for a tract of railroad indemnity land; and that involves the questions whether the tract so sought in indemnity is really open to such selection; whether it is subject to some prior claim; whether it is reserved mineral land; whether it has been withdrawn from entry or selection, and so on for quantity. The right of supervision and direction also extends to the *base* tracts designated in support of the proposed indemnity selection, and whether those tracts (*a*) are within the primary limits of the grant; (*b*) are actually lost to the primary grant; and, (*c*) whether they have ever been used before by the railroad company in support of some other indemnity selection.

All of those questions are properly material, and in respect of which the Secretary has the right to supervise, direct and control.

None of those questions, however, are here involved: the tracts sought to be selected as indemnity are open to such

selection; the tracts designated as base have been investigated and found to be properly and legally useable as base; but the Secretary, having passed upon all of those preliminary and vital questions, proceeds to attach a condition not warranted by the granting act and holds that the selection cannot be approved because, while the entire quarter-quarter-section is good base, it is not permitted to designate but 15 acres of that quarter-quarter-section as base unless the remaining 25 acres of the subdivision be also designated in the same list.

This therefore, is not a mere matter of office practice or administration, but is one of substantial property right, and, if not corrected by the court, must necessarily result in depriving appellant of certain parts of its indemnity grant.

As already noted, the Interior Department, in its administration of the public lands, and under divers and sundry laws, not only has authority, but has exercised it as well, to dispose of parts of minor legal subdivisions, even as small as a few acres, and the only possible concern that the Department can here have is that a tract designated as base shall be so identified and described as that it may be precisely located on its books and not again thereafter used by the same company.

In the instant case, every proper requirement has been met by appellant; the tract selected is open to selection by appellant; the base designated in support of the selection is good and valid base; and it is precisely identified and described, so that it may be located at once and at all times upon the diagrams, plats and records of the General Land Office.

If the indemnity selection, such as is here present, would be good if made by a State or Territory, as it clearly would be, as has been shown above, it is difficult to understand why a selection in like form is to be rejected if made by a

railroad grantee, the right of indemnity selection being substantially the same in both cases.

In the petition for allowance of appeal to this Court filed May 4, 1920, in the Court of Appeals of the District of Columbia, (R. 29-30), it was shown that the decree of said Court was subject to review by this Court under paragraphs one, five and six of the Judicial Code, in that the jurisdiction of the trial court was in issue, that the validity of an authority exercised under the United States and the existence and scope of a power or duty of the appellees, said appellees being officers of the United States, was drawn in question, and that the proper construction of the act of Congress, under which appellant claims, is also drawn in question.

The jurisdiction of the trial court was called in question by the appellees in their motion to dismiss the bill of complaint herein filed June 4, 1919, in the Supreme Court of the District of Columbia, (R. 23), wherein it was urged that the matters complained of are matters of mere administration of Federal law the details and conduct of which are within the exclusive jurisdiction of the appellees, and that the relief sought involves judicial interference with and control of a matter within the exclusive jurisdiction of the defendants, involving the exercise of their judgment and discretion.

The case of Lane vs. Hoglund (244 U. S., 174), involved a petition for a writ of mandamus against the Secretary of the Interior in which the writ was refused by the court of first instance but in which the Court of Appeals directed that it be granted. (44 App. D. C., 310). In that case this Court said (p. 175), "our jurisdiction arises out of the fact that the construction of a statute of the United States and the duty of the Secretary of the Interior thereunder are drawn in question."

The Court, after commenting upon the statute there under consideration, at p. 181, proceeded thus:

> "True, this court always is reluctant to award or sustain a writ of mandamus against an executive officer, and yet cases sometimes arise when it is constrained by settled principles of law and the exigency of the particular situation to do so. Kendall vs. United States, 12 Pet. 524; United States vs. Schurz, 102 U. S., 378; Roberts vs. United States, 176 U. S., 221; Garfield vs. Goldsby, 211 U. S., 249. And see Noble vs. Union River Logging Co., 147 U. S., 165; American School of Magnetic Healing vs. McAnnulty, 187 U. S., 94. *This, we think, is such a case.* As quite apposite we excerpt the following from the unanimous opinion in Roberts vs. United States, *supra*, p. 231:
>
> 'Unless the writ of mandamus is to become practically valueless, and is to be refused even when a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the office anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discrimination is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial,

and the court would on that account be powerless to give relief. Such a limitation in the powers of the court, we think, would be most unfortunate as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required.'

We therefore conclude that the Court of Appeals rightly directed that the writ be granted."

The case of Santa Fe Pacific Railroad Company vs. Lane, Secretary of the Interior, 244 U. S., 492, was a suit to enjoin the Secretary of the Interior from insisting upon or giving effect to a demand theretofore made by him on the appellant, requiring the latter to make an advance deposit under the act of June 25, 1910, (36 Stat., 834), of the estimated entire cost of surveying certain lands within the primary limits of the grant to the Atlantic and Pacific R. R. Company, by the act of July 27, 1866, (14 Stat., 292), to whose rights the appellant in that case has succeeded, instead of one half of the amount demanded, which latter amount was tendered but the tender rejected. The court of first instance refused the injunction and dismissed the bill, and its action was affirmed. (43 App. D. C., 497).

This Court, after referring to the facts in the case, and the provisions of the said act of June 25, 1910, *supra*, out of which the demand referred to arise, on p. 497, spoke as follows:

"We conclude that the provision of 1876 as supplemented by the Act of 1910, gives no warrant for demanding of the grantee in a land grant a deposit covering the entire cost of surveying a township wherein the grantee is entitled to only a part of the lands, and that in making such a demand of the plaintiff the de-

fendant plainly exceeded his authority. Thus, the demand was an unauthorized act done under color of office, and the defendant properly may be enjoined from insisting upon or giving effect to it, unless it be that there is an absence of other elements essential to granting such relief."

"We think the other elements are not wanting. * * * The plaintiff was not required in order to test the validity of the demand to permit the ninety days to pass and to rely entirely upon defending such suit as might be brought by the Attorney General. On the contrary, if the demand was unlawful, as we hold it was, the plaintiff was entitled to sue in equity to have the defendant enjoined from insisting upon or giving any effect to it. The hazard and embarrassment incident to any other course were such as to entitle it to act promptly and affirmatively, and of course there was no remedy at law that would be as plain, adequate and complete as a suit such as this against the defendant."

In the present case, as in the cases cited, it is respectfully submitted that the construction of a statute of the United States and the duty of the Secretary of the Interior thereunder are drawn in question; that it is not incumbent upon the appellant to suffer the cancellation of its selection list here in question for the reason stated in the decisions of the Commissioner of the General Land Office and the Secretary of the Interior, and await such time as patent may be issued to a third party under some other public land law of the United States and then rely upon a suit instituted against such patentee for the maintenance of such rights as it may think it is entitled to in and to the tract here involved, but that it is entitled to sue in equity to restrain and enjoin the appellees from enforcing a construction of a statute of the United States, which construction would deprive the appellant company of a substantial right guaranteed to it by the contract contained in the granting

act. It follows that the trial court had the necessary jurisdiction to make and enforce an appropriate decree granting the relief prayed.

In the case of Payne et al. vs. Central Pacific Ry. Co. *supra,* involving a selection of indemnity land under a railroad grant of like character, the question was raised by the pleadings that the legal title to the land there described was and remained in the United States, and that, upon the question as to whether it was donated and withdrawn for public purposes of the United States by virtue of the Executive order of the President or belonged to the railroad company by some character of title which it might assert in a court of law or equity, the United States was entitled to be heard, was a necessary party to the suit and had not been made a party, nor, furthermore, had it, in that behalf, consented to be sued.

This issue has not been raised by the pleadings in the present case, although practically identical in character, but it may be observed that this Court, in the Central Pacific case, *supra,* in reply to the contention held as follows:

> "We are asked to say that this is a suit against the United States and therefore not maintainable without its consent, but we think the suit is one to restrain the appellants from cancelling a valid indemnity selection through a mistaken conception of their authority and thereby casting a cloud on the plaintiff's title. Ballinger vs. Frost, 216 U. S., 240; Philadelphia Co. vs. Stinson, 223 U. S., 605, 619-620; Lane vs. Watts, 234 U. S., 525, 540."

CONCLUSION

It is respectfully submitted that the decree herein should be reversed and the Court below directed to enter appropriate decree in favor of the railroad company, restraining

and enjoining the defendants, in their official capacity, from rejecting the indemnity selection of the appellant company, insofar as the same may be based upon the certain matters hereinabove mentioned and considered.

C. F. R. OGILBY,
Attorney for Appellant.

Washington, D. C.,
September 26, 1921.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

SOUTHERN PACIFIC RAILROAD COMPANY, Appellant,
v.
ALBERT B. FALL, *Secretary of the Interior*, and WILLIAM SPRY, *Commissioner of the General Land Office*. } No. 60.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEES.

STATEMENT.

The appeal in this case (R. 30) is from a judgment of the Court of Appeals of the District of Columbia (R. 29), affirming a decree of the Supreme Court of the District (R. 24) dismissing a bill brought by the Southern Pacific Railroad Company to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from enforcing, and to compel them to vacate and set aside, certain rulings made by them with respect to an indemnity selection tendered by the said company. Opinion of the Court of Appeals, R. 27–29.

68866—21

THE FACTS.

By the act of July 27, 1866, c. 278, 14 Stat. 292, Congress made a grant of lands to the Atlantic & Pacific Railroad Company to aid in the construction of a railroad. This act, like other railroad land grants, gave the company the odd-numbered sections along the line of the railroad to the amount of 20 sections per mile on each side thereof through the Territories and 10 on each side through the States, and contained a provision for selections by the company from odd sections of lands within certain limits adjoining the granted lands, to cover losses of lands occurring in the granted or place limits.

Section 18 of the act (p. 299) authorized the Southern Pacific Railroad Company of California to connect with the Atlantic & Pacific Railroad, and made the same grants to aid in constructing the connecting line as were given to the Atlantic & Pacific Railroad.

As successor to the grantee named in section 18, the Southern Pacific Railroad Company in 1903 filed in the local land office at Los Angeles, Calif., an indemnity selection list for described land of an acreage of 99.46, basing it upon other described land said to be within the place limits and which had been lost to it. For some reason not disclosed, no action was taken thereon by the Commissioner of the General Land Office until 1918, when he held the selection for cancellation on the ground that the lands assigned as base were in fact within the indemnity

limits and hence not proper base for an indemnity selection. (Ex. H, R. 15.) Opportunity was given, however, to the company to substitute a valid base.

The company acquiesced in this decision and then reformed its application so as to predicate it upon lands within the place limits which had been lost by reason of the approval of them to the State of California under the swamp-land grant. The base assigned consisted of four tracts in the same section, two of 40 acres each, one of 10 acres, and the other of 5 acres, a total of 95 acres.

When this reformed selection came before the Commissioner for action he again held it for cancellation, on the ground that the base was still not satisfactory because a part of it, 15 acres, consisted of tracts less than a recognized legal subdivision. (Ex. J., R. 17, 18.) The railroad company then appealed to the Secretary of the Interior, who affirmed the decision of the Commissioner (Ex. L., R. 21, 22); whereupon the company instituted this suit and in its petition set up the facts herein narrated.

To the bill of complaint the defendants interposed a motion to dismiss upon the grounds that the bill stated no cause for equitable relief and failed to show facts to support a finding that the company would be deprived of any substantial right accruing to it under the law, and further, that the matters complained of are matters of mere administration which are within the exclusive control and jurisdiction of the defendants and of a character involving judg-

ment and discretion, not reviewable by the courts. (R. 23.)

PROPOSITIONS.

I. The court is without jurisdiction to hear the appeal.

II. The decision sought to be reviewed is impregnable to mandatory injunction, since it was made in the exercise of judgment and discretion.

I.

The Court is without jurisdiction to hear the appeal.

Appellant rests its right to review the decree below upon the first, fifth, and sixth paragraphs of section 250 of the Judicial Code, specifying the cases in which this court may review judgments and decrees of the Court of Appeals of the District of Columbia. (Petition for Appeal, R. 29, 30.) Those paragraphs are as follows:

> *First:* In cases in which the jurisdiction of the trial court is in issue.
>
> *Fifth:* In cases in which the validity of any authority exercised under the United States or the existence or scope of any power or duty of an officer of the United States is drawn in question.
>
> *Sixth:* In cases in which the construction of any law of the United States is drawn in question by the defendant.

Now, we find nothing in the record to afford a basis for a claim that the jurisdiction of the trial court was in issue in this case. Certainly the plaintiff, appellant

here, did not question the court's jurisdiction, for that was invoked by filing the bill. Likewise, the defendants (appellees) did not challenge the jurisdiction of the court, and the court itself did not rest its decision on lack of jurisdiction.

The only possible foundation for asserting that the question of jurisdiction was raised is to construe as so doing a portion of defendant's motion to dismiss. In paragraphs 3 and 4 of said motion it was claimed the bill showed that the details and conduct of the matters complained of were those of administration *within the exclusive jurisdiction* of the defendants and that the relief sought involved a judicial interference with the same.

But it surely is far fetched to say that such averments put in issue the jurisdiction of the trial court. The jurisdiction contemplated by the first paragraph of section 250 is the jurisdiction of the court as such. *Fore River Shipbuilding Co.* v. *Hagg*, 219 U. S. 175. No contention was made that the trial court did not have jurisdiction of the parties to the controversy or of the subject matter, or that it could not render such a judgment as it might determine proper under the pleadings. Clearly, all that was suggested by the motion to dismiss was that under general principles of law the court should not undertake to review a matter determined by the Secretary in the exercise of his judgment and discretion.

It is so palpable that the case does not come within the first paragraph of section 250 that we consider further comment unnecessary.

Neither is the case within the fifth paragraph of section 250. The *validity* of the Secretary's authority is not drawn in question by an assertion that it is improperly exercised. It must be conceded by appellant that the Secretary's authority to determine the ultimate question of whether the selection list should be approved was valid. A challenge going to the validity of the authority would raise the question of the power of Congress to confer that authority.

Furthermore, the existence or scope of a power or duty of the Secretary was not drawn in question within the meaning of section 250. The appellant by filing its selection list invoked the power resident in the Land Department, of which the Secretary of the Interior is the head, to pass upon the selection and determine its acceptability, and by so doing made it the *duty* of the Secretary to act in the matter. By now asserting that the existence of a power or duty of the Secretary is drawn in question in this case, appellant is denying those things which it in effect affirmed when it tendered its selection list.

It certainly will not be contended by appellant that the Secretary did not have the power to *approve* the selection. If he had the power to approve, certainly he had the power to reject, and a challenge of the correctness of his decision is not, under the decisions construing section 250, a drawing in question the existence or scope of his power or duty.

In fine, the real complaint of appellant is not of the lack of power or disregard of a duty of the Secre-

tary but of the effect of the exercise of the conceded power and the discharge of a clear duty. As this paragraph has been invoked to support appeals and writs of error in so many cases in this court, it is unnecessary to discuss what has been said on the point. We content ourselves with the citation of several of the leading and latest cases: *Taylor* v. *Taft*, 203 U. S. 461, 464; *Champion Lumber Co.* v. *Fisher*, 227 U. S. 445, 451; *Sykes* v. *Payne*, 254 U. S. 618; *Shaw and Palmer* v. *Payne*, 254 U. S. 609.

Not only is this case not within the purview of the first and fifth paragraphs of section 250 but it is likewise not within the sixth paragraph.

The only pleading filed by defendants was a motion to dismiss. There was nothing in that motion drawing in question the construction of a law of the United States, nor was the court asked to construe any law. It merely raised the question of the sufficiency of the averments of the bill to make a case against the defendants.

We therefore respectfully submit that this court is without jurisdiction to consider this appeal, and the case should be dismissed for that reason.

II.

The decision sought to be reviewed is impregnable to mandatory injunction, since it was made in the exercise of judgment and discretion.

The granting act, *supra*, in section 3 (p. 295) prescribed that the selections in lieu of losses in the place limits be made "under the direction of the Secretary of the Interior." Here is clear authority for the

adoption of suitable and appropriate regulations governing the making of such indemnity selections. Indeed, in the absence of such provisions, such authority would be presumed from the very fact that to the Secretary was committed the administration of the act.

For reasons satisfactory to him, the Secretary adopted a rule that in such indemnity selections he would not recognize as valid base, tracts of less than the ordinarily recognized smallest legal subdivision—40 acres—that is to say, if the railroad company desired to select an 80-acre tract it must offer as base a tract of like acreage or two tracts of 40 acres each. It could not marshal a number of 5, 10, or 15-acre tracts totaling 80 acres and on those secure the 80-acres which it desired to select. This rule was modified so as to make acceptable as base, tracts of lesser acreage if contained in a list specifying a number of tracts, provided that the balance of the legal subdivision was also used as base, in support of other tracts selected in the same list. (Ex. K, R. 19, 20, Southern Pacific Railway Company, 46 L. D.279.)

To illustrate: A land-grant railroad in making selections often files a list containing a large number of tracts which the company desires to acquire in satisfaction of its indemnity rights. This list might specify for selection a tract of 35 acres, and to support it two tracts, one of 20 acres out of a 40-acre subdivision, and the other 15 acres out of another 40-acre subdivision, might be assigned as base. If, however, in the same list, the balance of each of those

legal subdivisions was used as base for the selection of other tracts, it would be acceptable.

The reason for the adoption of the rule is stated to be (Ex. K, R. 20, 46 L. D. 281):

> * * * this rule was adopted in aid of the convenient and expeditious consideration of such lists and for the further purpose of avoiding loss to the Government through the possibility of the assignment of the same lands as the base for more than one selection * * *.

It is amplified in the opinion of the Court of Appeals (R. 28):

> On the other hand, counsel for the appellees urged that the practice in pursuance of which the selection was rejected is of long standing in the Land Department; that it was adopted by the Secretary because in his judgement it was the best method by which to guard against errors and to facilitate the keeping of accurate accounts with the land-grant railroads; that under it one can tell at any time by a glance of the eye "what legal subdivisions of lost base have been used in making lieu selections"; that to change the method now to conform with the views of the railroad company would be unwise, and would involve a radical departure from the present system of bookkeeping in that division of the department which has to do with the handling of railroad land selections. They point to the provision of the granting act which says that selections shall be made "under the direction of the Secretary of the Interior," and argue that the Secretary is thereby authorized to make such reasonable

> regulations touching the matter as he may deem proper. They add that the bill does not disclose that any substantial right of the railroad company is affected by the action of the defendants and that the contest is simply whether the method adopted by the Secretary or the one suggested by the railroad company is the better.

It is therefore clear that the whole controversy in this case concerns the advisability of the rule laid down by the Secretary. We assert that, as he had authority and power to prescribe rules governing selections, such rules as he promulgated must be upheld, since they are not shown to be unreasonable, inappropriate, or inconsistent with the law. *United States* v. *Morehead*, 243 U. S. 607.

Again, this is a proceeding in mandatory injunction. It is therefore to be tested by the same principles applicable to a proceeding in mandamus. It is well settled that in such a proceeding the court will not undertake to decide whether the matter complained of was correctly decided nor will it substitute its own judgment for that of the executive officer.

In the exercise of his judgment and discretion, the Secretary adopted a rule governing selection lists. The company's list here in question did not square with this rule, and for that reason the Secretary rejected it, exercising his undoubted jurisdiction and power.

Under the many decisions of this court the Secretary's action is not reviewable in a case such as

the one at bar. *Ness* v. *Fisher*, 223 U. S. 683; *Knight* v. *Lane*, 228 U. S. 6; *Alaska Smokeless Coal Co.* v. *Lane*, 250 U. S. 549. In the language of Mr. Justice McKenna in the last-cited case (p. 555):

> Where there is discretion * * * even though its conclusion be disputable, it is impregnable to mandamus.

The case of *Ness* v. *Fisher* is particularly in point. In that case the land department had promulgated a rule that applicants to purchase lands under the timber and stone act of June 3, 1878, must declare under oath that they had personally inspected the tract sought to be purchased. Ness presented an application without making that declaration. It was rejected because of that. Mandamus was sought against the Secretary on the ground that the regulation was void and unauthorized. This court said (p. 691):

> So, at the outset we are confronted with the question not whether the decision of the Secretary was right or wrong, but whether a decision of that officer, made in the discharge of a duty imposed by law and involving the exercise of judgment and discretion, may be reviewed by mandamus and he be compelled to retract it and to give effect to another not his own and not having his approval. The question is not new, but has been often considered by this court and uniformly answered in the negative.

It does not require much study of the case at bar to discover that it is a controversy over a trivial matter, merely an administrative detail. The case as exhibited by the appellant's bill does not

show that it has been prejudiced or that it has sustained any loss by virtue of the application of the Secretary's rule. Moreover, the rule to which the company objects is of long standing, and under it the grant has been administered. After so many years of acquiescence it is too late for the company to attack that rule, especially when the adjustment of the grant is so nearly completed. If there ever was a controversy in which the courts should not interfere, it is the present one. Our conception of the function of the courts does not include a meticulous supervision of the administrative machinery of the various executive departments of the Government. As was said by Mr. Chief Justice Taney in *Decatur* v. *Paulding*, 14 Pet. 496, at p. 516:

> The interference of the courts with the performance of the ordinary duties of the executive departments of the Government would be productive of nothing but mischief, and we are quite satisfied that such a power was never intended to be given to them.

CONCLUSION.

It follows that the Court of Appeals rightly disposed of the case and its decree should be affirmed.

Respectfully submitted.

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